

Source: Criminal Law/Defending Your Client in a Misdemeanor Case (Including a DUI) (Action Guide)/Introductory Material

Defending Your Client in a Misdemeanor Case
(Including a DUI)

Nicole Solis
Judge's Perspective by The Honorable Ron Albers,
Commissioner, San Francisco

JUNE 2007

Scope of Guide

This Action Guide provides guidance for an attorney whose client has been arrested for a misdemeanor. It takes you step-by-step from that first telephone call, through negotiating a disposition, to what to do after the client is sentenced. Steps for special procedures include, *e.g.*, DUI, immigration, and mental health issues.

Abbreviations

Appeals & Writs	<u>Appeals and Writs in Criminal Cases (3d ed Cal CEB 2007)</u>
Crim Defense Prac	Millman, Michael, et al., California Criminal Defense Practice (Matthew Bender 1981)
Crim Law	<u>California Criminal Law Procedure and Practice (Cal CEB Annual)</u>
Crim Law Forms Man	<u>California Criminal Law Forms Manual (2d ed Cal CEB 2005)</u>
Direct & Cross	<u>Effective Direct & Cross-Examination (Cal CEB 1986)</u>
Effective Intro of Evidence	<u>Effective Introduction of Evidence in California (2d ed Cal CEB 2000)</u>
Evidence Benchbook	Jefferson's California Evidence Benchbook (3d ed CJA-CEB 1997)
Evidentiary Foundations	Imwinkelried, Wydick & Hogan, California Evidentiary Foundations (3d ed Lexis 2000)
Laying a Foundation	<u>Laying a Foundation To Introduce Evidence (Preparing and Using Evidence at Trial) (Cal CEB Action Guide Spring 2006)</u>

About the Authors

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Acknowledgments

CEB appreciates and gratefully acknowledges the valuable contributions to previous editions of this Action Guide of the following consultants:

Alys Briggs, deputy public defender in the Alameda County Public Defender's Office.

Jeffrey B. Kupers, managing attorney of the California Appellate Project in San Francisco.

The Honorable William A. McKinstry, judge with the Superior Court of Alameda County and past chair of the Governing Committee of CEB.

John W. Noonan, who specializes in criminal law in Alameda and Contra Costa counties, with offices in Pleasanton.

Elaine Profant-Turner, who is in private practice in Eureka.

Robert M. Podesta, Jerry Coleman, Diane Knowles, and Jeff Ross, of the San Francisco District Attorney's Office.

Annie Gutierrez, who is in private practice in Bonita, San Diego County.

Joyce B. Ladar, who is in private practice in San Francisco.

David B. Pastor, who is in private practice in Walnut Creek.

William F. Tassi, of the Los Angeles City Attorney's Office.

CEB Attorney Editor Sara H. Ruddy and Legal Editors Enrique De Anda and Dorothy Robins contributed to this title. Christopher Forshay copyedited and handled production.

Cutoff Dates

We completed legal editing of this Action Guide at the end of March 2007.

We reviewed case citations through these cutoffs:

Shepard's California Citations at 40 C4th 165, 145 CA4th 756, 166 L Ed 2d 590, 469 F3d 109, 454 F Supp 2d 1118.

Shepard's United States Citations at 166 L Ed 2d 590, 470 F3d 331, 456 F Supp 2d 1137.

Shepard's Federal Citations at 166 L Ed 2d 590, 470 F3d 286, 456 F Supp 2d 1115.

We reviewed California and federal statute citations for amendments and repeals through these cutoffs:

California statutes for amendments and repeals through Stats 2007, ch 5.

Federal statutes for amendments and repeals through 121 Stat 61.

We try to add significant statutory and judicial developments, subsequent histories of cases, and other matters such as new forms and regulations after legal editing is done, but you should not assume that all developments after the listed cutoff dates have been included.

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Source: Criminal Law/Defending Your Client in a Misdemeanor Case (Including a DUI) (Action Guide)/When Client Is Arrested or Arrest Imminent/STEP 1. OFFER IMMEDIATE ADVICE TO CLIENT DURING INITIAL TELEPHONE CONVERSATION

When Client Is Arrested or Arrest Imminent

STEP 1. OFFER IMMEDIATE ADVICE TO CLIENT DURING INITIAL TELEPHONE CONVERSATION

WHEN CLIENT WILL TELEPHONE

Client will phone you when he or she:

- a. Has just been arrested; or
- b. Fears imminent arrest, *e.g.*, client hears that an arrest warrant has been issued, but client has not yet been arrested.

ADVISE CLIENT

Remain Silent

To avoid waiving constitutional right to remain silent (US Const amend V), tell client *not* to discuss the case, *unless you are present*, with:

- a. Law enforcement officials; OR
- b. Other inmates; OR
- c. Relatives; OR
- d. *Anybody.*

NOTE

Advise client not to volunteer or admit to noncitizen status when speaking with anyone.

O.R. Release Procedures

If client is in custody, tell client:

- a. That he or she may need to discuss personal facts with the person who handles applications for release on "own recognizance" (O.R.) (*e.g.*, facts about employment, residence, family circumstances; see [step 8](#), below); but
- b. *Not* to discuss facts of case with O.R. person or anyone at the jail.

Further Research: For suggested instructions to give client, see [California Criminal Law Procedure and Practice §23.5 \(Cal CEB Annual\)](#), referred to throughout this Action Guide as "Crim Law."

Source: Criminal Law/Defending Your Client in a Misdemeanor Case (Including a DUI) (Action Guide)/When Client Is Arrested or Arrest Imminent/STEP 2. OBTAIN INITIAL INFORMATION FROM CLIENT DURING INITIAL TELEPHONE CONVERSATION

STEP 2. OBTAIN INITIAL INFORMATION FROM CLIENT DURING INITIAL TELEPHONE CONVERSATION

OBJECTIVE

In initial telephone conversation, obtain enough information to:

- a. Evaluate your client's ability to pay your fees (see [step 4](#), below);
- b. Evaluate whether you wish to defend client (see [step 4](#), below) based on:
 - (1) Your experience;
 - (2) Time available;
 - (3) Particular issues in the case; and
 - (4) Whether you have a conflict of interest (see [step 4](#), below);
- c. Assist in client's release from custody (see [step 6](#), below);
- d. Collect and preserve evidence (see [step 10](#), below); and
- e. Conduct preliminary negotiations with prosecutor or law enforcement agency. See [step 11](#), below.

ASK APPROPRIATE QUESTIONS

Ask client:

Arrest

- a. Crimes client has been charged with; and
- b. Whether client talked with any law enforcement person about the facts of the case, and if so, person's:
 - (1) Name; and
 - (2) Phone number.

Possible "Holds"

Whether there are any "holds" on client's release, *i.e.*, client will not be released because, *e.g.*:

- a. Client is on probation ([Pen C §1203.3](#));
- b. Client is on parole ([Pen C §3056](#));
- c. There are outstanding warrants (in or out of county) for client's arrest, *e.g.*, failure to pay any traffic tickets, failure to pay child support; and/or
- d. If client is not a United States citizen, Immigration and Customs Enforcement (ICE) may place hold. See [step 17](#), below.

NOTE

An attorney may be able to obtain information on holds from the bailiff, the jail, or the sheriff's department.

Financial Information

- a. Bail amount:

- (1) Obtain from client, if client knows;
- (2) If client does not know, you may be able to determine bail amount by (for bail information see step 9, below):
 - (a) Reviewing schedule adopted by the courts;
 - (b) Examining the arrest warrant; or
 - (c) Asking the court clerk.
- b. How client will obtain money for bail and fees, including:
 - (1) Names and phone numbers of client's family or friends with money for bail;
 - (2) Whether client can pay immediately:
 - (a) For services you have already provided; and
 - (b) Your retainer; and
 - (3) How client will pay for your services during remainder of case if services not covered by retainer.

Witnesses or Evidence

Find out whether any witnesses or physical evidence must be immediately preserved. If so, do *not* discuss details on the phone, but arrange to talk to client in person.

If Client in Jail

If client is in jail, ask:

- a. Specific location and jail phone number;
- b. How client's name is listed on the booking records;
- c. Client's booking number (if client knows); and
- d. Client's Department of Corrections and Rehabilitation (CDC) number, if applicable.

AVOID INAPPROPRIATE QUESTIONS WHILE ON PHONE

Be aware that law enforcement personnel or other inmates may overhear this initial telephone conversation. Do *not* ask the client:

- a. About the actual *facts* of the offense; or
- b. *Names* of witnesses.

Further Research: Crim Law, chaps 1 (client interview) and 3 (right to counsel).

Source: Criminal Law/Defending Your Client in a Misdemeanor Case (Including a DUI) (Action Guide)/When Client Is Arrested or Arrest Imminent/STEP 3. DETERMINE WHETHER CLIENT IS CHARGED WITH MISDEMEANOR

STEP 3. DETERMINE WHETHER CLIENT IS CHARGED WITH MISDEMEANOR

CLASSES OF CRIME DEFINED

REVIEW CLASSES OF CRIME

All crimes are classified as (Pen C §17(a)):

- a. Felonies (see definition, below);
- b. Misdemeanors (see definition, below); OR
- c. Infractions. See definition, below.

Felony Defined

Felony is crime that is punishable with (Pen C §17(a)):

- a. Death; or
- b. Imprisonment in the state prison.

Misdemeanor Defined

Misdemeanor is crime that is:

- a. Not a felony (see definition, above);
- b. Not an infraction (see definition, below); and
- c. Punishable with maximum confinement of 1 year in a county detention facility. Pen C §§17(b), 19.2.

Infraction Defined

Infraction is crime that is (Pen C §19.6):

- a. Not punishable by imprisonment; and
- b. Classified as an infraction in statute defining the crime.

DETERMINE CLASS OF CRIME

REVIEW COMPLAINT

Review the complaint filed against the defendant, because it:

- a. Will give you the section of the Penal Code or other statute (*e.g.*, Vehicle Code, Health and Safety Code) under which defendant is being charged; and
- b. May state the classification of the crime with which defendant is being charged.

REVIEW STATUTE

If complaint does not state the class of crime being charged, review the statute that prescribes the punishment for the crime to determine its classification.

NOTE

Typically in California, the code section that defines a crime is followed by one or more sections that prescribe the punishment. See, *e.g.*, [Pen C §§242](#) (definition of battery) and [243](#) (punishment for battery).

Felony/Misdemeanor "Wobbler"

Crime can be either a felony or misdemeanor (*i.e.*, a "wobbler") if the punishment statute specifies that it may be punished by:

- a. Imprisonment in the state prison; or
- b. Imposition of a fine; or
- c. Imprisonment in the county jail.

When Wobbler Considered Misdemeanor

Wobbler will be considered a misdemeanor when it does not result in imprisonment in the state prison, *e.g.*, when ([Pen C §17\(b\)](#)):

- a. Judge imposes a fine or imprisonment in the county jail;
- b. Judge commits defendant to the Youth Authority and declares the crime to be a misdemeanor;
- c. Judge grants probation without imposition of a sentence and declares the crime to be a misdemeanor;
- d. Prosecutor files complaint specifying that the offense is a misdemeanor and defendant does not object to that classification; or
- e. Magistrate determines at or before the preliminary examination that the offense is a misdemeanor.

Example: Grand theft may be either a felony or a misdemeanor. See [Pen C §489](#).

Misdemeanor

Crime is a misdemeanor if the statute defining the crime:

- a. States that it is a misdemeanor, without including a penalty, in which case it is punishable by ([Pen C §19](#)):
 - (1) Imprisonment of 6 months or less in the county jail; or
 - (2) Fine not exceeding \$1000; or
 - (3) Both;
- b. Provides that it is punishable by 1 year or less in the county jail ([Pen C §19.2](#)); or
- c. States that it is a public offense and does not provide any penalty ([Pen C §19.4](#); see a., above, for penalty).

Infraction

Crime is an infraction if:

- a. The statute defining the crime states that it is an infraction;
- b. The crime is not punishable by imprisonment ([Pen C §19.6](#)); or
- c. The offense is a misdemeanor listed in [Pen C §19.8](#) and the prosecutor or the court, with the defendant's consent, elects to treat it as an infraction ([Pen C §17\(d\)](#)).

NOTE

At least one offense not listed in [Pen C §19.8](#)—petty theft of property valued at \$50 or less—that is ordinarily a misdemeanor may be charged as an infraction at the prosecutor's discretion. See [Pen C §§488, 490.1](#). For discussion, see [Crim Law §§6.32, 36.13](#).

CONSIDER EFFECT OF CLASSIFICATION

If Felony

The procedural requirements for prosecuting and defending a felony are more strenuous and usually require more expertise. See 1 Witkin & Epstein, California Criminal Law §79.

If Wobbler

- a. If crime is a wobbler, you may be able to bargain with the prosecution or judge to charge the offense as a misdemeanor; BUT
- b. You must follow felony procedural requirements until the classification is resolved.

If Infraction

If crime is an infraction:

- a. Defendant has no right to a jury trial (Pen C §19.6); and
- b. Defendant has no right to court-appointed counsel unless defendant remains in custody. Pen C §19.6; see In re Kevin G. (1985) 40 C3d 644, 221 CR 146 (minor's consent to have misdemeanor traffic offense treated as infraction was not effective, because he did not intelligently waive right to counsel).

Further Research: On the right to counsel, see Crim Law §§3.2-3.12.

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Source: Criminal Law/Defending Your Client in a Misdemeanor Case (Including a DUI) (Action Guide)/When Client Is Arrested or Arrest Imminent/STEP 4. DECIDE WHETHER YOU WANT TO TAKE THE CASE

STEP 4. DECIDE WHETHER YOU WANT TO TAKE THE CASE

ASSESS COMPLEXITY OF CASE

Analyze complexity of the issues, *e.g.*:

Custody

If client is in custody, will you have to fight to get client released?

Other Defendants

If there are codefendants involved:

- a. Has more than one defendant requested your services? See "Evaluate Possible Conflicts of Interest" below.
- b. Should defendants be tried at the same trial? See Crim Law §7.39.
- c. Has a codefendant made a statement against your client? See Crim Law §§7.40-7.41.

Conflicts

Have you or your firm represented:

- a. A co-defendant? See Crim Law §2.9.
- b. The victim or any witnesses? See Crim Law §2.10.

Prior Record

Does client have a record of prior arrests or convictions? If so, recognize that:

- a. Prior record might make negotiating a disposition more difficult (see step 32, below); and
- b. Prior record might affect the sentence that client receives.

Numerous Witnesses

Are there numerous witnesses? If so, you will spend more time preparing for and conducting trial.

DMV

Will client face DMV administrative hearing? See step 16, below.

Immigration

Will client's immigration status raise issues? See step 17, below.

DETERMINE WHETHER YOU HAVE TIME TO HANDLE CASE

Based on your evaluation of the complexity of issues in the case, estimate the number of hours you will need to:

- a. Research and prepare pretrial motions (see steps 13 and 36, below);
- b. Request and prepare for DMV administrative hearing;
- c. Make court appearances (pretrial motions, if necessary, may entail numerous appearances);
- d. Investigate and prepare facts for trial (see steps 20-30, below);

- e. Research and prepare for evidentiary issues at trial (see steps 42 and 46, below);
- f. Prepare for trial (see steps 40-41, below); and
- g. Research sentencing issues and prepare for sentencing hearing. See steps 53-70, below.

EVALUATE YOUR EXPERTISE

If you are not familiar with the legal issues in the case:

Acquire Expertise

Determine whether you will have time to acquire sufficient learning and skill by (see Cal Rules of Prof Cond 3-110):

- a. Associating or consulting another attorney; or
- b. Researching, studying, and practicing in the legal area covered in client's case.

Decline Case

Decline case if you do not have time to acquire sufficient expertise.

EVALUATE POSSIBLE CONFLICT OF INTEREST

Evaluate possible conflict of interest, *e.g.*, you represent a codefendant in the case. See Cal Rules of Prof Cond 3-310.

Decline Case

Decline case if you, *e.g.*:

- a. Represent a codefendant, and client will not sign written waiver of right to conflict-free representation (see *People v Mroczko* (1983) 35 C3d 86, 103, 197 CR 52); or
- b. Have represented the victim or any witness. See *People v Pennington* (1991) 228 CA3d 959, 965, 279 CR 85; *People v Bonin* (1989) 47 C3d 808, 835, 254 CR 298.

NOTE

If you have questions regarding conflicts, call the State Bar Ethics Hotline at 1-800-238-4427 (1-800-2-ETHICS).

BE SURE THAT YOU ARE WILLING TO GO TO TRIAL

If you are unwilling, afraid, or unable to go to trial, do *not* take the case, because:

- a. Even though most cases do not go to trial, your effectiveness in pretrial negotiations and motion work will be significantly lessened if you are not willing to go to trial; and
- b. The outcome for your client will probably be worse than if it had been handled by someone ready to go to trial. For discussion of necessity of being prepared to go to trial, see step 40, below.

ESTIMATE FEES AND COSTS

- a. Calculate your fees based on the number of hours you estimate the case will take. See above.
- b. Determine whether you will want to obtain expert assistance, and assess the probable cost for, *e.g.*, consultation, testing, and testimony.

DECLINE IF CLIENT UNABLE TO PAY

- a. Ask client to make arrangements for your fees and costs, *e.g.*, to make a retainer payment.
- b. Decline case if you are not satisfied that client is able to pay fees and costs.

NOTE

If your client is having trouble getting the money for a misdemeanor bail, you will undoubtedly have problems obtaining your legal fees; if necessary, refer client to public defender or County Bar Association for low-fee or no-cost services.

Further Research: See Crim Law, chaps 1-2.

IF YOU DECIDE TO REPRESENT CLIENT

ENTER RETAINER AGREEMENT

- a. If client expenses are reasonably likely to exceed \$1000, you *must* have a signed written agreement. A signed duplicate of the fee agreement must be given to the client or the contract is voidable. Bus & P C §6148.
- b. Regardless of whether *required* by Bus & P C §§6146-6148, protect yourself by having written agreement with *all* clients.
- c. Make sure you and client agree whether representation includes related noncriminal proceedings, *e.g.*, DMV hearings. See step 16, below.

Form

For sample agreements, see California Criminal Law Forms Manual §§3.1-3.2 (2d ed Cal CEB 2005), also referred to as "Crim Law Forms Man."

OBTAIN FEES

To avoid future problems, it is a good idea to obtain payment in advance.

NOTE

If your client later is unable to pay your fees, consider asking the court to appoint you as counsel. See People v Castillo (1991) 233 CA3d 36, 55, 284 CR 382.

Further Research: See Crim Law, chap 3.

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STEP 5. OBTAIN FURTHER INFORMATION

ARRANGE TO GET DOCUMENTS

Get copies of police reports and related information from:

- a. Client; or
- b. Court file.

CONSIDER CONTACTING INVESTIGATING OFFICERS

Decide whether to contact the investigating police officers to get additional information about the case. See [step 11](#), below.

INTERVIEW CLIENT

Conduct an immediate preliminary interview to obtain details of the case from the client:

- a. In your office; or
- b. At the jail. See below.

If Client Is In Custody

Call jail to determine:

- a. When you can conduct interview with client.

NOTE

For security reasons, most jail facilities have certain times when you will not be able to meet with your client.

- b. Location of the facility and client.
- c. Special jail entrance requirements, *e.g.*, dress code prohibits you from wearing jeans.
- d. Any special identification you will need, *e.g.*, you may need to present a picture identification plus your current state bar identification card or obtain a jail pass.

Obtain Details of Case

When you meet client in person, get:

- a. Facts of the case;
- b. Names and addresses of witnesses; and
- c. Additional information you might need to assist client in being released. See [steps 6-9](#), below.

If Client Has Not Been Arrested

Arrange for client:

- a. To surrender; and
- b. To be rapidly released on bail or O.R. See [step 8](#), below.

When Assisting With Client's Release

STEP 6. REVIEW YOUR ROLE IN MAKING ARRANGEMENTS FOR YOUR CLIENT'S RELEASE

REVIEW AVAILABLE METHODS FOR RELEASE

Review three basic methods for release from custody, *e.g.*:

- a. Citation (for definition, see [step 7](#), below);
- b. Released on client's own recognizance (O.R.) (for definition, see [step 8](#)), below); or
- c. Bail. For definition, see [step 9](#), below. See also [Appendix F](#).

WHEN YOUR ASSISTANCE IS APPROPRIATE

Citation

- a. Usually, client is automatically released on a citation, and you will not need to assist.
- b. You might contact the arresting officer to determine why citation was not issued if:
 - (1) The offense is one for which a citation is available (see [step 7](#), below); AND
 - (2) Client has not been released on a citation.

O.R.

- a. Usually, you do not handle the procedures for O.R. at the early stages; BUT
- b. You may assist the O.R. staff in gathering information (see [step 8](#), below);
- c. You may also handle the clearing of any holds on client's release (see [step 8](#), below); and
- d. If client is not released on O.R. before the arraignment, you may more actively seek client's release at the first appearance in court (see [step 13](#), below). For discussion of O.R. release, see [step 8](#), below.

Bail

- a. Usually, the bail will be set and client released without you taking any action;
- b. You may need to assist a client who is not familiar with bail procedures (see [step 9](#), below); and
- c. At arraignment, you may seek to have bail set at a lower amount. See [step 13](#), below.

Source: Criminal Law/Defending Your Client in a Misdemeanor Case (Including a DUI) (Action Guide)/When Assisting With Client's Release/STEP 7. REVIEW RULES FOR RELEASE BY CITATION

STEP 7. REVIEW RULES FOR RELEASE BY CITATION

CITATION GENERALLY

CITATION DEFINED

Citation is the method to release client from custody after client (Pen C §853.6):

- a. Receives a notice of when to appear in court; and
- b. Signs a promise to appear at that future court date.

When Available

Citation is available for most minor offenses.

When Not Available

Release on citation may not available when:

- a. The charge involves violation of domestic violence protective orders (Pen C §853.6(a)).
- b. One or more of the circumstances set forth in Pen C §853.6(i) applies, *e.g.*:
 - (1) Defendant is intoxicated;
 - (2) Defendant has outstanding arrest warrants;
 - (3) Defendant did not provide satisfactory personal identification; and/or
 - (4) Arresting officer has reason to believe defendant would not appear in court if released.
- c. One or more of the circumstances listed in Veh C §§40302-40303 applies.

ADVANTAGES OF CITATION

- a. Citation is cost-free to client, *e.g.*, client need not pay for bail. On cost of bail, see step 9, below.
- b. Client is released immediately, without the delay of investigation or hearings, *i.e.*, citation will result in faster release than other methods, discussed in steps 8 and 9, below.

ADVICE FOR CLIENT

- a. When client signs the citation, he or she is not admitting guilt, but rather promising to keep future court dates.
- b. If the client refuses to sign the promise to appear, client will *not* be released on the citation. Pen C §853.6(i)(8); Veh C §40302(b).

IF CLIENT FAILS TO APPEAR

CONSEQUENCES

If client fails to appear in court after release by citation:

Bench Warrant

The court will issue bench warrant for client's arrest (Pen C §853.8); and

Additional Charge

Client may be charged with additional misdemeanor offense—failure to appear (FTA) (Pen C §853.7).

Source: Criminal Law/Defending Your Client in a Misdemeanor Case (Including a DUI) (Action Guide)/When Assisting With Client's Release/STEP 8. REVIEW RULES FOR RELEASE ON OWN RECOGNIZANCE (O.R.)

STEP 8. REVIEW RULES FOR RELEASE ON OWN RECOGNIZANCE (O.R.)

O.R. GENERALLY

O.R. DEFINED

Method to release client from custody when ([Pen C §1270](#)):

- a. Court determines client to be eligible for release on his or her "own recognizance," *i.e.*, client is likely to appear at the time and date set for court hearing (for discussion, see "Judge Evaluates O.R.," below); and
- b. Client signs an agreement that he or she ([Pen C §1318](#)):
 - (1) Promises to appear at a future court date;
 - (2) Promises not to leave the state;
 - (3) Will obey all conditions imposed by the court;
 - (4) Waives extradition; and
 - (5) Acknowledges that he or she was informed of possible penalties if he or she violates conditions of release. See (1)-(4), above.

When Available

Client not released on citation is entitled to O.R. as a matter of *right* ([Pen C §1270\(a\)](#)) in most situations when charged only with misdemeanor. See [step 7](#), above.

When Not Available

Client will not be released on O.R. when judge decides that ([Pen C §1270](#)):

- a. Defendant would not appear in court as promised (see "Judge Evaluates O.R.," below); or
- b. Defendant's release would compromise public safety (*Dant v Superior Court* (1998) 61 CA4th 380, 71 CR2d 546).

Domestic Violence Notice and Hearing Requirement

In domestic violence ([Pen C §273.5](#)), domestic battery ([Pen C §243\(e\)\(1\)](#)), and stalking ([Pen C §646.9](#)) cases, the law requires 2 court days' written notice to the prosecutor and defense attorney before a bail reduction or O.R. release may be ordered. [Pen C §1270.1\(b\)](#).

ADVANTAGE OF O.R.

O.R. is cost-free, *e.g.*, client need not pay for bail. On cost of bail, see [step 9](#), below.

DISADVANTAGES OF O.R.

- a. O.R. may be a time-consuming procedure because of the need for:
 - (1) Research and investigation about the client by the O.R. project (see "O.R. Procedure," below); and
 - (2) A hearing before a judge. See "Judge Evaluates O.R.," below.
- b. Depending on the volume of cases in the county, and the availability of information about your client:
 - (1) Client may be released on O.R. almost immediately, before the arraignment; or
 - (2) The O.R. information may not be presented to the judge until arraignment.

CONSIDER ALTERNATIVE TO O.R.

If the O.R. procedure is too slow, consider referring client to a bail bond company or the court clerk to arrange a release on bail. See [step 9](#), below.

EFFECT OF "HOLDS"

CHECK OTHER HOLDS

Check with the jail facility to determine whether your client has any other "holds" (for discussion of holds, see [step 2](#), above), *e.g.*:

- a. Pending charges;
- b. Outstanding arrest warrants;
- c. Probation or parole hold; or
- d. Immigration and Customs Enforcement (ICE) hold.

Effect of Holds

Even if the court orders O.R., your client will not be released from jail until *all* holds are removed. It is in your client's best interest to wait until you clear other existing holds before requesting release on O.R.

Further Research: See [Crim Law §5.42: *In re Law* \(1973\) 10 C3d 21, 23, 109 CR 573.](#)

NOTE

To clear a hold, you must deal with the jurisdiction in which the hold originated, unless your client can post bail on the offense that gave rise to the hold.

CONSIDER INTERACTION OF O.R. AND HOLDS

If any holds are in effect, even if court allows an O.R. release:

- a. Jail will not release client (see above); and
- b. Client will not receive custody credits against the possible sentence for current offense while in custody but on O.R. status. For discussion of custody credits, see [step 70](#), below.

Example: Your client is arrested for vandalism ([Pen C §594](#)). The client has a hold from a prior case. You seek and obtain O.R. in the vandalism case, but the client:

- c. Will *not* be released from jail because of the hold; AND
- d. Will *not* receive credit against the possible vandalism sentence while in custody but on O.R. status.

O.R. PROCEDURE

DETERMINE LOCAL PROCEDURES

If client cannot be released by citation (see [step 7](#), above; [Pen C §853.6](#)), determine how your jurisdiction handles O.R. by calling:

- a. Court clerk;
- b. Local O.R. "project" or "program," *i.e.*, staff employed by court to investigate and recommend for or against O.R. (see [Pen C §1318.1](#));
- c. Custodian of jail facility; or
- d. Other attorneys practicing in the jurisdiction.

Titles Vary

The title of the person(s) handling the O.R. investigation and how you contact them varies from county to county, *e.g.*:

- a. In San Francisco, contact the O.R. Project;
- b. In other counties the contact may be with:

- (1) Probation department;
- (2) O.R. unit located at the jail; or
- (3) O.R. program.

Further Research: See [Crim Law §5.2](#) for a chart of whom to contact about O.R. in selected counties.

O.R. STAFF ASSISTS COURT

The O.R. staff (not you) assists the court by:

Gathers Information

a. Interviewing:

- (1) Client;
- (2) Client's employers and relatives; and

b. Acquiring:

- (1) Client's rap sheet; and
- (2) Initial police incident report.

Presents Information to Judge

Presenting information to an assigned judge.

NOTE

Generally, you do *not* participate in the interviewing, gathering, or presenting of information to the court at this time (although you can ask the court to release your client on O.R. at any time). For discussion of amount of time O.R. takes, see "Disadvantages of O.R.," above.

MAY ASSIST O.R. STAFF

You may contact the O.R. staff and offer to help them get names, phone numbers, and addresses of references.

MAKE WRITTEN MOTION IN DOMESTIC VIOLENCE, DOMESTIC BATTERY, AND STALKING CASES

In domestic violence, domestic battery, and stalking cases, to obtain an O.R. or reduction in bail, a written motion must be made with 2 days' notice. [Pen C §1270.1](#).

JUDGE EVALUATES O.R.

The judge decides whether to allow client to be released on O.R. by evaluating (see [Pen C §§1270, 1275](#)):

a. Seriousness of the incident, *e.g.*:

- (1) Injury, if any, to the victim;
- (2) Whether client threatened victim or any witness;

b. Whether client has:

- (1) Stability in the community, *e.g.*, client is a homeowner or a long-time resident;
- (2) Family ties to the community; and
- (3) Work ties to the community, *e.g.*, steady employment;

c. Client's criminal history;

d. Client's record of failure to appear in court (bench warrants); and

e. Whether client will threaten public safety.

JUDGE'S OPTIONS

Judge can:

- a. Order the client released on O.R.;
- b. Require you to give notice to the prosecuting attorney that you are seeking release of the defendant (see Pen C §§1274 and 1289); or
- c. Deny O.R. and set bail. See step 9, below.

CLIENT SIGNS AND FILES RELEASE FORM

If court orders O.R. (Pen C §1318):

- a. Court will give client release agreement form (promise to appear); and
- b. Client:
 - (1) Signs form; and
 - (2) Files form with the court clerk.

IF CLIENT FAILS TO APPEAR

CONSEQUENCES

If client fails to appear for the next court date:

Bench Warrant

The court will issue bench warrant for client's arrest (Pen C §978.5); and

Additional Charge

Client may be charged with additional misdemeanor offense—failure to appear (FTA) (Pen C §1320(a)).

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Source: Criminal Law/Defending Your Client in a Misdemeanor Case (Including a DUI) (Action Guide)/When Assisting With Client's Release/STEP 9. REVIEW RULES FOR BAIL AND HELP ARRANGE FOR RELEASE ON BAIL

STEP 9. REVIEW RULES FOR BAIL AND HELP ARRANGE FOR RELEASE ON BAIL

BAIL GENERALLY

BAIL DEFINED

- a. To be released on bail (see Pen C §§1268-1276), client provides bond or cash in an amount set by the court. See "How Bail Amount Determined," below.
- b. If client does not appear in court, the amount of bail will be paid to the state. See "Costs if Client Fails to Appear," below; Appendix F.

WHEN AVAILABLE

Client charged with a misdemeanor is entitled to bail as a *matter of right*, both before and after conviction. Cal Const art I, §12; Pen C §§1273, 1272(1)-(2).

EFFECTIVE PERIOD OF BAIL

Release

When bail is accepted, the defendant is released. Pen C §1269b.

Exoneration

- a. The court "exonerates" the bail when it is no longer needed, *e.g.*:
 - (1) Defendant is in custody (Pen C §§1300-1302); or
 - (2) Charges are dismissed. Pen C §1303.
- b. For effect of exoneration, see "Bail Procedures," below.

HOW CLIENT PROVIDES BAIL

Client, family, or friends may provide bail by:

Bond

Giving a bail bond company:

- a. Cash in the amount required by the bail bond company, *e.g.*, 10 percent of the bail amount; and
- b. Collateral with a value in excess of the bail amount, *e.g.*, United States Treasury bonds, stock certificates, real property.

NOTE

Bail bond company issues bond that is filed with the court, *i.e.*, company promises to pay cash to the court if defendant does not appear.

Cash

Paying cash to the clerk of the court in the full face amount of the bail. Pen C §1295.

JUDGE'S PERSPECTIVE

Check with law enforcement agency or court clerk to determine whether court will accept bank cashier's checks, money orders, traveler's checks, or personal checks instead of cash.

Other Assets

Although posting bond and paying cash are the most frequently used bail methods, if client cannot use these methods, consider bringing a motion to deposit (Pen C §1298):

- a. State or United States government bonds; or
- b. Equity in real property.

HOW BAIL AMOUNT DETERMINED

The amount of bail may be (Pen C §1269b):

- a. Fixed by the amount stated in the:
 - (1) Arrest warrant; or
 - (2) Schedule of bail that has been adopted for the county by the courts (see Pen C §1269b(c)-(d)); or
- b. Set by a judge.

COST OF BAIL

Bond

- a. If obtaining bail bond, client pays *nonrefundable*:
 - (1) *Cash fee* required by the bail bond company to post the bail bond, *e.g.*, 10 percent of the bail amount; plus
 - (2) *Processing fee* that bail bond company often charges; plus
- b. Client provides *refundable* collateral, usually in excess of the full bail amount, *e.g.*, double the face amount of the bail.

Example: If court sets bail in the amount of \$5000, client may *pay* \$500 plus fees to the bail bond company, and *temporarily give* the company a savings bond valued at \$10,000, to be redeemed when bail is exonerated.

Cash

If paying cash bail:

- a. Client pays full amount of bail directly to court.
- b. Bail is fully refundable.

COSTS IF CLIENT FAILS TO APPEAR

Be aware that client will not get any refunds if client fails to appear in court. Pen C §1305. See "If Client Fails to Appear," below.

CONSIDER AMOUNT OF TIME BAIL TAKES

Posting bail is usually faster than the O.R. release procedure.

CHECK OTHER HOLDS

Recognize that other "holds" (see step 8, above) will also prevent defendant from being released even if bail is posted. See Crim Law §5.42; In re Law (1973) 10 C3d 21, 23, 109 CR 573.

Example: If client has an Immigration and Customs Enforcement hold, he or she will be released from jail to the ICE holding facility.

BAIL PROCEDURES

HOW TO POST BAIL BOND

Direct client, client's family, or client's friends to:

- a. Pay the required cash to bail bond company; and
- b. Guarantee the remaining 90 percent with real or personal property collateral in a value set by the bail bond company.

Obtain Release When Bail Exonerated

When court exonerates bail:

- a. Client must ask bond company to release the bond and collateral.
- b. Bail bond company will not refund the 10 percent fee or the processing fee.

NOTE

Advise client not to lose the receipt received from the bonding company, so client can request a release.

HOW TO PAY CASH BAIL

- a. Direct client, client's family, or client's friends to pay the full amount of the bail in cash to the court clerk, to be held until the charges are dismissed or the client is sentenced. Pen C §1295.
- b. Inform client that when bail is paid in cash, entire amount will be returned when case is dismissed or resolved as long as client does not fail to appear.

Obtain Release When Bail Exonerated

When court exonerates bail, client must request the clerk to return the cash to the depositor. Pen C §1297.

NOTE

If release is not prepared automatically, advise client not to lose the receipt received from clerk.

IF CLIENT FAILS TO APPEAR

CONSEQUENCES

Be aware that if client fails, without sufficient excuse, to appear for arraignment, trial, or judgment (Pen C §1305(a)), the court will:

Bench Warrant

Issue a bench warrant for client's arrest.

Forfeiture of Bail

Declare bail forfeited.

Bail Provided by Bail Bond Company

- a. Bail bond company must pay court entire bail amount.
- b. Client forfeits the collateral.

Cash Bail

Entire cash amount is forfeited.

SEEK RELIEF IF CLIENT FAILS TO APPEAR

If client fails to appear (see Pen C §979):

- a. Immediately contact the court to arrange a court date for client to appear to avoid client's arrest on the bench warrant; and
- b. At that hearing, convince the court that client's failure to appear was excusable under Pen C §1305(a), *e.g.*, defendant was ill.

NOTE

It is good practice to have client sign a waiver of personal appearance ("977 waiver"; see Pen C §977), so that you can appear for client if client is unable to make court appearance (see step 12, below).

JUDGE'S PERSPECTIVE

a. If judge determines that client does not have sufficient excuse for not appearing, judge will (Pen C §1305):

- (1) Declare bail forfeited;
- (2) Issue a bench warrant; and

(3) Set bail on the bench warrant.

b. If you show that client does have sufficient excuse, judge may grant a continuance (Pen C §1305(b)) and order that:

(1) Client will not forfeit bail;

(2) Bench warrant will not issue; and

(3) New date be set for client to appear in court.

c. Judge may not accept 977 waiver if client was ordered present. See Pen C §977(a)(2)-(3).

Further Research: See Crim Law, chap 4.

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Source: Criminal Law/Defending Your Client in a Misdemeanor Case (Including a DUI) (Action Guide)/When Assisting With Client's Release/STEP 10. CONDUCT YOUR INITIAL INVESTIGATION

STEP 10. CONDUCT YOUR INITIAL INVESTIGATION

OBJECTIVE

Objective of initial investigation is to preserve favorable evidence that may be lost over time.

WITNESS STATEMENTS

INTERVIEW WITNESSES PROMPTLY

- a. Find out the names of witnesses as soon as possible after the incident occurs.
- b. Interview witnesses right away.

REASONS TO INTERVIEW EARLY

Difficult to Locate

You might have difficulty locating the witness if you wait to interview closer to trial.

Example: When the incident occurred in a public place or where people tend to be transient, it will be more difficult to locate witnesses as time passes.

NOTE

Recognize that the loss of witnesses may work against your defense effort, or work to your advantage.

Memory Fades

The witness's memory could fade, although normally this is not a problem with only a few days' delay between incident and interview, but a feeble or emotionally distressed person should probably be interviewed immediately.

Before Police

You want to interview the witnesses before the police interview them, if possible.

NOTE

If the witness has already given a statement to the police, you should review the statement with the witness for completeness and accuracy.

Avoid Fabrication Claim

If you already have an idea how you will structure your defense, interview witnesses early so the prosecutor will not be able to argue that defense evidence is fabricated. For considerations in interviewing witnesses, see [step 22](#), below.

HAVE THIRD PARTY PRESENT AT WITNESS INTERVIEWS

Be sure the interview is conducted by or in the presence of an investigator or other third party to make sure that if a witness changes his or her story on the stand, you will have evidence to impeach.

NOTE

Consider *not* getting written or recorded statements, because [Pen C §1054.3](#) appears to indicate the prosecution is entitled to disclosure of "written or recorded" statements of witnesses you intend to call at trial. But note that in [Roland v Superior Court \(2004\) 124 CA4th 154, 21 CR3d 151](#), the court held that the prosecution is also entitled to disclosure of oral statements of witnesses. See [step 27](#), below; [Crim Law §11.10](#).

JUDGE'S PERSPECTIVE

You may ask the court to allow a material witness to be "examined conditionally" (*i.e.*, that testimony of witness be recorded before trial) when ([Pen C §1336](#)):

- a. Witness is about to leave the state, or is so sick or infirm as probably to be unable to attend trial; or
- b. Witness's life is in jeopardy.

Be sure that you follow requirements of Pen C §1336 to avoid delay that could result in the loss of the testimony of the witness.

PHYSICAL EVIDENCE

CONSIDER PHYSICAL EVIDENCE

Determine whether you need to:

- a. Immediately preserve physical evidence that may be lost over time, *e.g.*, tapes of calls to 911 must be subpoenaed before they are destroyed (tapes are usually erased after short time).
- b. Pursue other physical evidence as part of your later investigation (see step 23, below), *e.g.*:
 - (1) Blood or urine samples from the client or others;
 - (2) Fingerprints from an object or location;
 - (3) Medical treatment or examination of the client's body;
 - (4) Clothing or other objects;
 - (5) Taking photographs if appearance of the location or lighting is important;
 - (6) Taking photographs *and* measurements if, *e.g.*, the location of a bench or bus stop is important.

AVOID TAMPERING OR DESTROYING

If you go to the scene and find a piece of evidence, you should be very careful to avoid:

- a. Tampering with or destroying evidence; or
- b. Appearing to tamper with or destroy evidence.

NOTE

Before moving evidence from the scene of the crime, research your ethical responsibilities. See below.

RECOGNIZE YOUR ETHICAL OBLIGATIONS

If during investigation you or your investigator discover physical evidence of a crime that is unknown to the police:

Do Not Hide Evidence

You have an ethical obligation not to hide or alter the evidence (*People v Lee* (1970) 3 CA3d 514, 526, 83 CR 715).

If You Take Evidence

Inform the court immediately if you (*People v Superior Court (Fairbank)* (1987) 192 CA3d 32, 39, 237 CR 158):

- a. Move;
- b. Take; or
- c. Alter physical evidence relating to the client's charged crime.

May Observe

If you merely observe physical evidence as a direct result of a privileged attorney-client communication, your observation is also privileged, unless you alter or remove the evidence.

Example: Defendant told his attorney that he had thrown victim's wallet in a certain garbage can. Attorney told investigator employed by attorney about wallet. Investigator found the wallet and took it to the police. The court held (*People v Meredith* (1981) 29 C3d 682, 695, 175 CR 612):

- a. The communication from defendant to attorney to investigator was *privileged*; BUT

b. Because the investigator moved the wallet, the prosecutor was entitled to ask the investigator about wallet and where investigator found it, without investigator having to reveal:

- (1) Content of attorney-client communications; or
- (2) Original source of information; and

c. If investigator (or attorney) had chosen just to observe the wallet and not remove it, the prosecution would not have been allowed to question investigator (or attorney) about it.

Further Research: For discussion of ethical concerns, see 1 Erwin, et al., California Criminal Defense Practice §1.34 (1981), referred to throughout this Action Guide as Crim Defense Prac.

JUDGE'S PERSPECTIVE

If you have a concern about possible ethical issues, contact the State Bar Ethics Hot Line at 1-800-238-4427 (1-800-2-ETHICS).

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Source: Criminal Law/Defending Your Client in a Misdemeanor Case (Including a DUI) (Action Guide)/When Assisting With Client's Release/STEP 11. CONSIDER DISCUSSING CASE WITH PROSECUTION OR INVESTIGATING OFFICER

STEP 11. CONSIDER DISCUSSING CASE WITH PROSECUTION OR INVESTIGATING OFFICER

WHEN APPROPRIATE

Contact investigating law enforcement officer or attorney in prosecutor's office who will be filing complaint, when:

To Get Further Information

You want to obtain further information about the facts of the case, *e.g.*, to decide whether client should make statement (see "Decide Whether Client Should Make Statement," below).

To Respond If Arrest Imminent

Your client is not yet in custody and:

- a. Is being investigated concerning criminal activity; or
- b. An arrest warrant is issued.

To Respond If Contacted

Investigating police officer calls your client or sends a letter asking for an interview.

NOTE

To avoid inadvertent admissions by your client, *you* should talk to the investigating officer yourself, rather than allowing your client to do it.

WHAT TO DISCUSS

Consider, *e.g.*:

The Case

- a. Asking what the case is about, including any discovery prosecutor or officer may provide;
- b. Asking about possibility of getting case discharged;
- c. Learning the prosecutor's attitude about your client and the case (see below);
- d. If it would result in leniency for your client, trading information or evidence in exchange for a reduction in the charge or even dismissal of the action.

With a misdemeanor charge, prosecutors are rarely willing to be lenient enough to make it beneficial for you to trade information; if client does trade information, be sure to investigate the possibility of obtaining immunity for your client.

Client's Surrender, If Not Yet in Custody

Negotiating for client to surrender in exchange for:

- a. Being released on O.R.; or
- b. Reduction in bail. For discussions of O.R. and reduction in bail, see [step 8](#), above, and [step 13](#), below.

DECIDE WHETHER CLIENT SHOULD MAKE STATEMENT

To decide whether your client should make a statement:

Evaluate Facts

- a. Obtain information about the case from prosecutor or investigating police officer;
- b. Weigh whether a statement:

- (1) Could help to clear the client of wrongdoing; or
 - (2) Provide prosecutor with mitigating evidence; and
- c. Review any documents or other evidence in client's possession to make sure client's statement cannot be impeached by such evidence.

Consider Polygraph

Have client take a reputable private polygraph test *before* agreeing to allow prosecution to polygraph client, because:

- a. A test showing that your client is telling the truth about his or her innocence may convince prosecutor to drop the charges;
- b. You do not want to agree to a polygraph test, and then have client fail; and
- c. You want to prevent your client from making admissions during the interview or test.

NOTE

Polygraph results are not admissible in California courts (Evid C §351.1), but admissions the client makes during the examination are admissible (Evid C §1220).

Discuss With Client

Find out whether client wants to make a statement.

EXERCISE CAUTION

Exercise extreme caution *before* you provide information to the prosecution or police, because:

- a. Your client has a constitutional right to remain silent (US Const amend V);
- b. You must keep information you receive from your client confidential (Evid C §§950-962);
- c. You have a right to protect work product from disclosure (CCP §§2018.010-2018.080); and
- d. Something you say might be used against the client at some other time. See Crim Law §23.20; People v Crow (1994) 28 CA4th 440, 451, 33 CR2d 624.

Example: If you are negotiating release of the client because of a health condition, your disclosure of a health problem could later be used to compel blood testing, lead to segregation in custody, or enhance a sentence. See, *e.g.*, Pen C §§647f, 1202.1, 1202.6, and 1524.1.

EXPLAIN DISCLOSURE OR STATEMENT TO CLIENT

If you decide to allow client to make a statement, or to provide any other information to prosecution or law enforcement:

- a. Clearly discuss with client the ramifications of providing the statement, or any information, to the prosecution or law enforcement, *e.g.*, prosecutor may use any material disclosed *against* client;
- b. If *you* are providing information, make sure client agrees and understands significance *before* you provide information; and
- c. It is better practice to obtain client's *written* consent before you make any disclosure to the prosecution (although it is not required).

Further Research: On confessions and admissions generally, see Crim Law, chap 23.

When Client Arraigned

STEP 12. REVIEW BASIC ARRAIGNMENT PROCEDURES

OBJECTIVE OF ARRAIGNMENT

The objectives of arraignment are to:

- a. Ensure that the defendant understands the charges and the procedures necessary to move forward in the criminal process.
- b. Allow defendant to plead guilty or not guilty. See generally [Pen C §§976-991](#); see [Appendix D](#) for timeline and deadlines concerning arraignment. See also [Appendix F](#).

INSTRUCTION, PLEA, AND SETTING COURT DATE

JUDGE INSTRUCTS DEFENDANT

Unless defendant waives instructions (see below), judge informs defendant of basic rights and procedures (also referred to as "Instruction and Arraignment"), *e.g.*:

- a. Reads the complaint to defendant in open court ([Pen C §988](#));
- b. Inquires into defendant's financial ability to retain a lawyer ([Pen C §987\(c\)](#));
- c. Appoints an attorney if defendant does not have the financial ability to hire one ([Pen C §987](#));
- d. Explains the various pleas that defendant could enter; and
- e. Informs defendant of the time limitation on setting the case for trial. For time limits, see [step 14](#), below.

JUDGE'S PERSPECTIVE

Some courts advise all defendants in the courtroom of their rights, *e.g.*, videotaped readings of rights are shown in some courts at specified hours of the day, *e.g.*, at the beginning of the court day or after the noon recess. See [Pen C §977\(a\)](#).

DEFENDANT MAY WAIVE INSTRUCTION

Defendant has the right to waive the reading of the complaint and explanation of rights.

When to Waive

Consider waiving instruction when:

- a. You as the defendant's attorney have already explained the charges, basic rights, and procedures to the client;
- b. Client may be embarrassed to have charges read out loud in public at the arraignment; or
- c. You and client will have to wait around for instruction.

Further Research: On advisement of charges and rights generally, see [Crim Law §§6.12-6.16](#).

JUDGE'S PERSPECTIVE

Be aware that if:

a. You do *not* waive statement of rights, the judge may continue case until the next time court advises a group of defendants, *e.g.*, you and client will have to appear again in the afternoon session.

b. You *do* waive statement of rights, the judge may ask:

(1) You whether you have personally advised the defendant; and

(2) Defendant whether you so advised.

Explain these rights to the defendant *before* the arraignment, so that the judge will allow defendant to waive instruction.

DEFENDANT ENTERS PLEA

The judge will ask defendant whether he or she pleads (Pen C §988):

a. Guilty; or

b. Not guilty.

May Ask for Continuance

Defendant may ask for additional time before entering plea. Pen C §990.

COURT SETS OTHER COURT DATES

After defendant enters plea, court sets other court dates. See step 14, below.

SPECIAL ADVISEMENT IN DUI CASES

Court Must Give Advisement on Seriousness of Offense

As of January 1, 2005, the court must give the following advisement on the record in drunk driving cases (Veh C §23593):

"You are hereby advised that being under the influence of alcohol or drugs, or both, impairs your ability to safely operate a motor vehicle. Therefore, it is extremely dangerous to human life to drive while under the influence of alcohol or drugs, or both. If you continue to drive while under the influence of alcohol or drugs, or both, and, as a result of that driving, someone is killed, you can be charged with murder."

When Advisement Required

This advisement must be given to every person who:

a. Is convicted of driving while intoxicated (Veh C §23152 or §23153); or

b. Pleads guilty or nolo contendere to reckless driving after being charged with driving while intoxicated (known as a "wet reckless") (Veh C §§23103, 23103.5).

Advisement Must Be on the Record

The court must make a record of the advisement by:

a. Including it on a plea form; or

b. Otherwise specifying in the record, *e.g.*, by minute order, that the advisement was given.

DMV Must Be Notified That Advisement Was Given

The court must include the fact that the advisement was given on the abstract of conviction or violation sent to the Department of Motor Vehicles.

Defense Counsel's Obligation to Advise Client

It is very important for counsel to be aware of this requirement and to explain to the client that:

a. The fact that this advisement was given will be part of the record of the present conviction;

- b. That record will be admissible evidence in any subsequent prosecution involving driving while intoxicated; and
- c. The fact that the client was given this advisement can be used in a future prosecution to supply an essential element of the crime of murder, if it is also established that:
 - (1) The client was driving under the influence of alcohol or drugs;
 - (2) The client was involved in a traffic accident; and
 - (3) Someone was killed in the accident.

IF CLIENT ALREADY APPEARED WITHOUT COUNSEL

If client already appeared in court before contacting you, find out status of case, *i.e.*, determine whether client, *e.g.*:

- a. Was informed by judge of his or her rights;
- b. Postponed arraignment until he or she could bring attorney to court; or
- c. Continued case to allow client to get an attorney, and most probably also:
 - (1) Waived instruction and arraignment on the complaint;
 - (2) Waived time for trial in order to give the court time to continue the case. See [step 14](#), below.

NOTE

Recognize that defendant must be properly informed of the charges in order for prosecution to proceed with the case. See [Crim Law §6.9](#) for a discussion of effect of failure to arraign defendant in a timely manner.

WHEN YOU APPEAR (WITH OR WITHOUT DEFENDANT)

DEFENDANT NEED NOT APPEAR

If you appear, client is ordinarily not required to appear at arraignment or for most other court appearances on a misdemeanor charge ([Pen C §977\(a\)](#) (defendant waives appearance)).

Defendant's Attendance Required

- a. Defendant's presence is required in misdemeanor case involving ([Pen C §977\(a\)\(2\)](#)):
 - (1) Domestic violence (see [Fam C §6211](#)); or
 - (2) Violation of a protective order (see [Pen C §273.6](#)).
- b. At discretion of judge, defendant's presence may be required in misdemeanor case charging one of following offenses involving driving under the influence ([Pen C §977\(a\)\(3\)](#)):
 - (1) Vehicular manslaughter with gross negligence ([Pen C §192\(c\)\(3\)](#));
 - (2) Reckless driving involving consumption of alcohol ([Veh C §§23103-23103.5](#));
 - (3) Driving under the influence of alcohol or drugs ([Veh C §23152](#)); or
 - (4) Causing injury while driving under the influence of alcohol or drugs ([Veh C §23153](#)).

Court May Prefer Attendance

Find out whether judge prefers that defendant appear with counsel at court appearances, *e.g.*, judge wants to be certain that the client understands:

- a. Constitutional rights; or
- b. If convicted, the terms of the sentence.

JUDGE'S PERSPECTIVE

Expect the judge to ask you on the record whether your client has authorized you to proceed without him or her.

If your client is a corporation, see Pen C §1396 on who may appear. See also Crim Law §26.3.

Court May Require Written Waiver

Although not *required* in misdemeanor cases, you may want to have defendant sign a *written* Waiver of Defendant's Personal Appearance (Pen C §977(b)), if court:

- a. Questions whether defendant has knowingly waived right to be present; or
- b. Requires written waiver.

Further Research: For waiver form that can be adapted for use in misdemeanor cases, see Crim Law Forms Man §6.1.

If Defendant in Custody

An incarcerated defendant may:

- a. Demand to be brought to court for arraignment (Pen C §976(a));
- b. Appear by counsel only (Pen C §977(a)); or
- c. Upon written waiver, agree to arraignment by two-way audio-video communication. Pen C §977(c).

JUDGE'S PERSPECTIVE

If you want to enter a guilty plea when client is absent, check with court to see whether written waivers are *required*. Many courts have preprinted forms for guilty pleas in driving under the influence (DUI) cases. See *Boykin v Alabama* (1969) 395 US 238, 23 L Ed 2d 274, 89 S Ct 1709; *In re Tabl* (1969) 1 C3d 122, 81 CR 577; *Mills v Municipal Court* (1973) 10 C3d 288, 110 CR 329.

RECOGNIZE EFFECT OF APPEARANCE

If you state on the record that you are appearing on behalf of defendant:

- a. You are usually making a general appearance; and
- b. You cannot withdraw from representing defendant unless the court approves.

NOTE

Before making a general appearance as attorney of record, make sure you have your fee arrangement with defendant finalized.

Further Research: On handling arraignment, see Crim Law, chap 6.

Source: Criminal Law/Defending Your Client in a Misdemeanor Case (Including a DUI) (Action Guide)/When Client Arraigned/STEP 13. MAKE APPROPRIATE MOTIONS AT ARRAIGNMENT

STEP 13. MAKE APPROPRIATE MOTIONS AT ARRAIGNMENT

DEMUR TO THE COMPLAINT

WHEN APPROPRIATE

Object to the sufficiency of the complaint by filing a demurrer (see Pen C §1004) when:

Jurisdiction

Court does not have jurisdiction over the offense, *e.g.*, the acts alleged did not take place in the county in which the court is located.

Unconstitutional Statute

Statute under which defendant is charged is unconstitutional (*Velasco v Municipal Court* (1983) 147 CA3d 340, 195 CR 108).

Defective Complaint

Complaint:

- a. Does not conform to the pleading requirements of Pen C §§950, 952;
- b. Charges more than one offense and joinder is not permitted under Pen C §§954 and 954.1;
- c. Does not state facts that constitute a public offense;
- d. Contains facts that, if true, would constitute:
 - (1) Legal excuse or justification; or
 - (2) Bar to prosecution, *e.g.*, statute of limitations has run (see Pen C §§799-805.5); or
- e. Is uncertain and does not provide adequate notice of the offense charged (see *Lamadrið v Municipal Court* (1981) 118 CA3d 786, 790, 173 CR 599 (complaint did not specify on which factual theories prosecutor would rely); *Sallas v Municipal Court* (1978) 86 CA3d 737, 742, 150 CR 543; but see *Ross v Municipal Court* (1975) 49 CA3d 575, 122 CR 807).

TIME TO DEMUR

- a. Make demurrer (Pen C §§1002, 1003):
 - (1) At the time of arraignment or any other time allowed by the judge; AND
 - (2) *Before* the entry of a plea; or
- b. Ask the judge to reserve your right to demur and proceed with entry of plea.

JUDGE'S PERSPECTIVE

If client has already entered a not guilty plea, the court may allow client to withdraw it in order to hear the demurrer.

HOW TO DEMUR

Prepare written demurrer that (Pen C §1005):

- a. Is signed by you or defendant; and

- b. Specifies each ground of your objection to the complaint. See above.

JUDGE'S PERSPECTIVE

If you do not have a written demurrer ready at the arraignment, ask the court for a brief continuance so that you may prepare the demurrer and have it heard before client enters a plea.

WHEN TO ARGUE DEMURRER

Once you file the demurrer, the court must hear the argument *immediately*, unless it finds cause for a continuance. Pen C §1006.

EFFECT OF DEMURRER

If Granted

If the court sustains the demurrer, prosecution will be given leave to amend the complaint if the defect can be remedied. Pen C §§1007-1009.

If Denied

If court overrules demurrer, defendant will be given the opportunity to enter a plea, *e.g.*, not guilty. Pen C §1007.

EFFECT OF FAILURE TO DEMUR

If you fail to demur, you waive any error in the complaint, *except* you will not waive (Pen C §1012):

- a. Lack of jurisdiction; or
- b. Failure to state a public offense.

NOTE

As a general rule, an argument concerning the constitutionality of the statute under which defendant is charged is not waived by failure to demur. See, *e.g.*, In re George T. (2004) 33 C4th 620, 16 CR3d 61. Such an argument can usually be restated as an allegation that the complaint fails to state a public offense.

Further Research: Demurrers are discussed in Crim Law §§7.20-7.26A.

DEMAND PROBABLE CAUSE DETERMINATION (PEN C §991 MOTION)

WHEN APPROPRIATE

Consider making motion for probable cause hearing, *i.e.*, a Pen C §991 motion, when:

- a. You want the court to make an independent judicial determination of whether there is probable cause to believe that (Pen C §991):
 - (1) A public offense has been committed; and
 - (2) Defendant is guilty of that offense; and
- b. Your client is in custody at the time of arraignment.

REVIEW CASE LAW

Before you move, review leading cases, *e.g.*:

- a. In re Walters (1975) 15 C3d 738, 126 CR 239 (recognizing that misdemeanor defendant has right to probable cause hearing);
- b. People v Ward (1986) 188 CA3d Supp 11, 235 CR 287 (applying Pen C §991 procedures);
- c. Gerstein v Pugh (1975) 420 US 103, 43 L Ed 2d 54, 95 S Ct 854 (original federal case recognizing constitutional right to speedy

probable cause determination);

d. *County of Riverside v McLaughlin* (1991) 500 US 44, 114 L Ed 2d 49, 111 S Ct 1661 (interpreting *Gerstein v Pugh, supra*, to require probable cause hearing *within 48 hours of arrest*).

Further Research: For further discussion of probable cause hearings, see Crim Law §§6.23, 25.33.

JUDGE'S PERSPECTIVE

Be aware that the court may have held a *McLaughlin* probable cause hearing (see *County of Riverside v McLaughlin, supra*) *before* the arraignment, *e.g.*, if 48 hours falls on weekend or holiday.

WHEN TO MOVE

Make a motion to determine probable cause (Pen C §991(a)):

- a. At the arraignment;
- b. After client has pleaded not guilty.

If Earlier *McLaughlin* Hearing

If the court held a *McLaughlin* probable cause hearing *before* the arraignment and *before* client was represented (see Judge's Perspective, above):

- a. You may want to make a Pen C §991 motion at the arraignment, in order to make sure the court determines probable cause based on the proper evidence (see below); BUT
- b. Expect prosecutor to argue (and court *may* agree) that you are not entitled to a second review of probable cause.

HOW TO MOVE

Orally ask the court to dismiss the complaint.

EVIDENCE COURT CONSIDERS

Prosecutor must provide to the court documents required by Pen C §991(c), including:

- a. Arrest warrant *with* supporting affidavits;
- b. Sworn complaint *with* documents and reports that are incorporated by reference; or
- c. Other similarly reliable documents.

NOTE

If you are having problems obtaining police reports and related discovery, use a Pen C §991 motion.

If Complete Evidence Not Provided

If prosecution does not provide the proper supporting affidavits and incorporated documents, the court should grant your Pen C §991 motion and dismiss for lack of probable cause.

DEFENDANT ENTITLED TO IMMEDIATE RULING

- a. Court must *immediately* determine whether there is probable cause; UNLESS
- b. It grants defense request for continuance of *not more than 3 court days*, based on showing of good cause, *e.g.*, to investigate the information provided by prosecutor. Pen C §991(b).

NOTE

You have the right to request this continuance; it is not the prosecutor's right or for the judge's convenience. See *In re Walters* (1975) 15 C3d 738, 750, 126 CR 239.

EFFECT OF MOTION

If Granted

If court grants motion:

- a. Court dismisses the complaint and discharges the defendant (Pen C §991(d)); and
- b. Prosecution may refile the dismissed complaint within 15 days. Pen C §991(e).

If Denied

If court denies motion:

- a. You enter a not guilty plea (see Pen C §991(d)); and
- b. Court sets the matter for trial. Pen C §991(d).

EFFECT OF YOUR SECOND MOTION

Prosecution may not further prosecute the same offense (Pen C §991(e)) if:

- a. Prosecution refiles the dismissed complaint (see above); and
- b. You bring a Pen C §991 motion as to the second complaint; and
- c. Court dismisses complaint a second time.

MOVE FOR RELEASE ON O.R. OR REDUCTION IN BAIL

WHEN APPROPRIATE

Consider moving for O.R. release or bail reduction when client:

- a. Is *in custody* at time of arraignment; or
- b. Has been released on bail, but you believe that bail should be reduced or exonerated. See steps 8-9, above.

WHAT TO DO

Move to:

- a. Have defendant released on O.R.; or
- b. Reduce bail if facts justify a lower amount.

NOTE

In domestic violence (Pen C §273.5), domestic battery (Pen C §243(e)(1)), and stalking (Pen C §646.9) cases, you must give 2 court days' written notice to the prosecutor. Pen C §1270.1(b).

Further Research: See Van Atta v Scott (1980) 27 C3d 424, 438, 166 CR 149 (what court must consider for release from custody). For discussion, see Crim Law §§5.10-5.29, 6.24.

JUDGE'S PERSPECTIVE

Be prepared to answer judge's questions about whether you verified the information given to you by your client, *e.g.*, employment information.

Because this is a discretionary decision by the judge:

- a. Highlight reasons why your client needs to remain out of custody, *e.g.*, to work to support family.

b. Remind judge that it is the *prosecution's* burden to prove that defendant is not a good O.R. risk. See *Van Atta v Scott* (1980) 27 C3d 424, 166 CR 149.

c. Address additional factors in Pen C §1275 when appropriate, *e.g.*, nature of offense, client's criminal record or lack of criminal record, likelihood of client's making required court appearances.

IF COURT ORDERS O.R.

If court orders O.R. (Pen C §1318):

- a. Obtain a release agreement form from the court clerk;
- b. Have your client sign form; and
- c. File form with the court clerk.

Further Research: For general discussion of O.R. release procedures, see Crim Law §§5.10-5.15.

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Source: Criminal Law/Defending Your Client in a Misdemeanor Case (Including a DUI) (Action Guide)/When Client Arraigned/STEP 14. OBTAIN NEXT COURT DATE (AND POSSIBLY TRIAL DATE)

STEP 14. OBTAIN NEXT COURT DATE (AND POSSIBLY TRIAL DATE)

JUDGE SETS NEXT COURT APPEARANCE

At the arraignment the judge will order future appearances in the case, either:

Pretrial

One date for pretrial conference where you:

- a. Discuss possible settlement; and
- b. If not settled, set future dates for pretrial motions or jury trial; or

Trial and Pretrial

Two dates simultaneously for:

- a. Jury trial (within or outside the statutory time limits, depending on your "time waiver" decision; see below); and
- b. Pretrial conference date before the trial date to consider settlement.

Further Research: See [Appendix D](#) for a timeline and deadlines in a misdemeanor case. See also [Appendix F](#).

DEADLINE FOR TRIAL DATE

DEADLINE FOR TRIAL

The case must be tried ([Pen C §1382\(a\)\(3\)](#)):

If Client in Custody

Within **30** calendar days from either arraignment date or date of entry of plea, whichever is later, if client is in custody on the later date.

If Client Not in Custody

Within **45** calendar days from either arraignment date or date of entry of plea, whichever is later, if client is not in custody on the later date. For additional deadline to begin trial when trial date has been set, see "Deadline to Begin Trial When Date Set," below.

JUDGE'S PERSPECTIVE

Be aware that many courts do not routinely allow continuances for counsel's convenience. In addition, although in misdemeanor cases there is no provision comparable to [Pen C §987.05](#), which prohibits the court from appointing as counsel in a felony case an attorney who cannot be ready to go to trial within the statutory timeframe, some courts handling misdemeanors are inquiring about counsel's readiness to go to trial within the time required by statute.

WHEN DEADLINE FOR TRIAL BEGINS

Case must be tried within time limits that begin to run from the *latest* of date on which ([Pen C §1382\(a\)\(3\)](#)):

- a. The defendant is arraigned;
- b. The defendant enters a plea of not guilty; OR
- c. Criminal proceedings are reinstated after a defendant previously deemed incompetent to stand trial is found to be competent.

Effect of Return Following a Bench Warrant

A new deadline for trial begins when client is arrested and brought to court after court issued a bench warrant because client failed to appear. Pen C §1382(a)(3)(C).

WAIVING TIME FOR TRIAL

WHEN TO WAIVE TIME

The defendant can waive time for trial beyond the statutory limits (Pen C §1382(a)(3)); consider waiving time when it would:

Benefit Client

Benefit you and your client by giving you more time to prepare for pretrial motions or jury trial.

WAIVING TIME DOES NOT *REQUIRE* LATER DATE

Even if defendant waives time, court:

- a. Has discretion to set the case for trial *within* the statutory time limits; and
- b. May set the case for trial within statutory limits to meet Judicial Council's case-disposition time standards (see Cal Rules of Ct, Standards of J Admin 2.2(k) (90 percent of misdemeanor cases disposed of within 30 days of defendant's first arraignment on complaint, 98 percent within 90 days, 100 percent within 120 days)).

JUDGE'S PERSPECTIVE

Many courts are making vigorous efforts to shorten the delay for criminal trials.

FAILURE TO OBJECT IS A WAIVER

If you fail to object to a trial date beyond the statutory limits, you have implicitly consented to the time extension. Pen C §1382(a)(3)(B).

NOTE

Consider carefully before you enter a *general waiver* of the 30-day or 45-day trial requirement; a general waiver may affect client's speedy trial interests. See Pen C §1382(a)(3)(A).

DEADLINE TO BEGIN TRIAL WHEN DATE SET

DEADLINE FOR TRIAL

The trial must begin:

If Defendant Does Not Waive Time

If defendant has not waived time for trial or consented to setting trial date beyond statutory period, trial must begin within the statutory period. Pen C §1382(a)(3); see "Deadline for Trial Date," above.

If Defendant Waives Time

Penal Code §1382 describes two ways in which a defendant can waive time:

a. Defendant can consent to a trial date beyond the statutory period for trial without entering a general time waiver (Pen C §1382(a)(3)(B)). In this situation, trial must begin:

- (1) On date set; or
- (2) Within 10 *calendar* days of scheduled trial date.

JUDGE'S PERSPECTIVE

Some courts will ask you and client to waive time for trial and set the matter as "0 of 10," 0 being the date set and 10 referring to the following 10 calendar days in which to bring the case to trial.

a. Defendant can enter a general time waiver, *i.e.*, can waive time for all purposes. If trial date is set beyond the statutory period for trial because client entered general waiver (Pen C §1382(a)(3)(A)) and if client later wants to proceed on a no-time-waiver basis:

- (1) Defendant must give all parties notice of withdrawal of general time waiver; and
- (2) Trial must begin within 30 calendar days following withdrawal.

NOTE

When the client has entered a limited time waiver, on the date set for trial, it is a good idea for counsel to announce readiness for trial *and* object to further delay. This will start the 10-day "trailing" period.

Further Research: Compare *Stephens v Municipal Court* (1986) 180 CA3d 189, 194, 225 CR 508 (formal objection to further delay required to start 10-day period), with *Bryant v Superior Court* (1986) 186 CA3d 483, 498, 230 CR 777 (no formal objection required). For discussion, see Crim Law §19.23A.

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Source: Criminal Law/Defending Your Client in a Misdemeanor Case (Including a DUI) (Action Guide)/When Client Arraigned/STEP 15. OBTAIN INITIAL DISCOVERY AT OR BEFORE ARRAIGNMENT

STEP 15. OBTAIN INITIAL DISCOVERY AT OR BEFORE ARRAIGNMENT

HOW TO OBTAIN DISCOVERY

At the arraignment, defendant is *automatically* entitled to receive certain documents (see below).

Counsel should:

- a. Contact prosecutor and ask for discovery as soon as you determine that you will be representing the client, although prosecutor may not have the documents until actual date of arraignment (on how to conduct discovery, see [steps 28-29](#), below).
- b. Review court files for any additional information about the case that may not be produced at time of arraignment (see below).
- c. Make informal request for additional or subsequent discovery from prosecutor. [Pen C §1054.5\(b\)](#); see [steps 28-29](#), below.

Sample Form: For sample request for discovery, see [Appendix G](#).

DOCUMENTS PROVIDED AT ARRAIGNMENT

The court or prosecuting attorney usually gives defendant a copy of ([Pen C §988](#)):

- a. Complaint; and
- b. List of witnesses.

JUDGE'S PERSPECTIVE

Although most courts do automatically provide defendant with a copy of the complaint, it is not *required* by [Pen C §988](#) in a misdemeanor. If you do not receive a copy of the complaint, request it from the prosecutor or the court.

DOCUMENTS NOT AUTOMATICALLY PROVIDED

Prosecution is *not* required to produce the following at the time of arraignment:

- a. Police reports;
- b. Arrest reports; and
- c. Crime reports.

How to Obtain

- a. Review court file that might contain these documents. See [In re Walters \(1975\) 15 C3d 738, 751, 126 CR 239](#).
- b. Bring a motion for probable cause determination ([Pen C §991](#) motion), if client is in custody. See [step 13](#), above.

OTHER INFORMATION PROSECUTOR MAY PROVIDE

At arraignment, prosecutor may also provide to the defense any of the information that it is obligated to produce. See [Pen C §1054.1](#); [Brady v Maryland \(1963\) 373 US 83, 10 L Ed 2d 215, 83 S Ct 1194](#); [People v Wheeler \(1992\) 4 C4th 284, 14 CR2d 418](#). For information prosecutor must provide defense, see [steps 28-29](#), below.

Further Research: For general discussion of discovery, see [Crim Law, chap 11](#).

Source: Criminal Law/Defending Your Client in a Misdemeanor Case (Including a DUI) (Action Guide)/When Special Proceedings/STEP 16. ANTICIPATE SUSPENSION/REVOCAION OF DRIVER'S LICENSE IN DUI CASE

When Special Proceedings

STEP 16. ANTICIPATE SUSPENSION/REVOCAION OF DRIVER'S LICENSE IN DUI CASE

WHEN APPLICABLE

When client is arrested for driving under the influence (DUI), driver's license is automatically suspended 30 days after arrest (Veh C §§13353.2, 13382(b)). See Appendix E for timeline and deadlines in DUI case.

NOTE

Driving with an illegal *breath* alcohol level, as well as with an illegal blood alcohol level, may violate the statute. See Veh C §23152(b); see also People v Bransford (1994) 8 C4th 885, 35 CR2d 613 (no need for evidence of partition ratios between concentration of alcohol in breath and concentration of alcohol in blood because offense based on *either* blood-alcohol level *or* breath alcohol level).

LICENSE TAKEN BY ARRESTING OFFICER

OFFICER IMMEDIATELY TAKES LICENSE

The *arresting officer* IMMEDIATELY:

- a. Gives client an order suspending driving privileges effective 30 days later (Veh C §§13353.2(b), 13382, 23158.5(a), (b)); and
- b. Takes client's license and sends it to the Department of Motor Vehicles (Veh C §§13382(c), 23158.5(c)).

CLIENT GIVEN TEMPORARY LICENSE

Arresting officer gives client a temporary license that is effective for only 30 days from the date of arrest. Veh C §§13382(b), 23158.5(b).

WHEN CLIENT'S LICENSE SUSPENDED

30 days after the date of arrest, the client's license is suspended (Veh C §13353.3(a)), *unless* DMV sets aside the suspension:

- a. On its own review (see below); or
- b. After conducting a hearing, *which you must request* (for discussion of demanding a DMV hearing, see below).

DMV ADMINISTRATIVE REVIEW

DMV RECEIVES EVIDENCE

- a. The arresting officer forwards the documents to DMV immediately (Veh C §23612(g)(1)); and
- b. If a blood or urine test was done, DMV receives the chemical test results within **15** calendar days. Veh C §23612(g)(1).

DMV REVIEWS SUSPENSION

Before the effective date of the suspension (30 days after arrest):

- a. DMV *automatically* conducts an administrative review (Veh C §13557) of:

- (1) Officer's report;
- (2) Order of suspension; and
- (3) Chemical test results.

NOTE

This administrative review is *not a hearing*, and you cannot wait for the DMV to act on the administrative review before you demand a hearing. For discussion of how to demand a hearing, see below.

- b. If the test shows that client's blood alcohol content (BAC) was *less* than .08 percent, DMV (Veh C §13557(b)(2)):
 - (1) Sets aside the suspension or revocation; and
 - (2) Returns client's license.

DMV ADMINISTRATIVE HEARING

DEMAND A DMV HEARING

Within **10** days after client receives notice of suspension or revocation, which officer should have given to client on *arrest*, client must demand a *hearing*. Veh C §13558(b).

Purpose of Hearing

- a. Present evidence against the suspension or revocation; or
- b. Argue against the suspension or revocation.

JUDGE'S PERSPECTIVE

Do not confuse the DMV hearing with the criminal case.

DEADLINE FOR HEARING

If client's request for hearing is postmarked within **10** days of receipt of notice of suspension or revocation (which client should have received on arrest), DMV must conduct hearing before effective date of suspension. Veh C §13558(d).

Effect of Failure to Conduct Hearing

DMV must stay the suspension of client's license if it does not conduct hearing before deadline. Veh C §13558(e).

PREPARE FOR ISSUES AT THE HEARING

Issues at the hearing are limited (Veh C §13558(c)), *e.g.*, whether:

- a. Arresting officer had reasonable cause to believe client was driving a motor vehicle in violation of Veh C §23152 or §23153.

NOTE

In *Troppman v Valverde* (Apr. 26, 2007, S132496) 2007 Cal Lexis 4195, the California Supreme Court decided a dispute between courts of appeal and held that it is not necessary to prove that a person actually was driving immediately before an arrest for driving under the influence. Thus, when an officer has a reasonable belief that an intoxicated person was driving immediately before his or her investigation, that will trigger the implied consent statute (Veh C §23612) to accept a drug or alcohol test, or both, or face the consequences of a driver's license revocation or suspension.

- b. Client was placed under arrest.
- c. Client was told that driving privileges would be suspended for 1 year or revoked for 2 or 3 years if client (see Veh C §23612(a)(1)(D)):

(1) Refused to submit to chemical test (blood, breath, or urine) of blood alcohol level; or

(2) Failed to complete a test.

d. If client knew of chemical test requirement:

(1) Test results showed that client was driving with a BAC of .08 percent or more; or

(2) Client refused to submit to test or failed to complete it after being requested to do so by the arresting officer.

JUDGE'S PERSPECTIVE

Be sure to make a complete record at the *DMV hearing*; no new evidence will be considered by the court when reviewing the DMV hearing.

EFFECT OF DMV DECISION

DMV's determination of facts at the administrative hearing has no effect on subsequent criminal proceedings. Veh C §§13557(f), 13558(g).

COURT REVIEW OF DMV HEARING

REQUEST COURT REVIEW

Within **30** days after the notice of decision, the client can file a request with the superior court to review the result of the administrative hearing. Veh C §13559.

JUDGE'S PERSPECTIVE

Remember that the judge reviewing the DMV order cannot take any additional evidence and will review only the record of the administrative hearing (not evidence from the *criminal case*).

Even if your client wins and the superior court rescinds the DMV order, the court's findings have no collateral estoppel effect in the subsequent *criminal case*. See Veh C §13559(b) (litigation of same facts in criminal proceeding not precluded).

Check cases for the effect on the DMV of dismissal of the criminal charges. See, e.g., Mosier v DMV (1993) 18 CA4th 420, 22 CR2d 249 (dismissal of driving under influence charges in exchange for plea of guilty to reckless driving charges not "acquittal" requiring reinstatement of driver's license). If your client wants to enter into a plea bargain for a lesser charge, ask the prosecutor for a stipulation to the facts and request court to make a not guilty finding as to the DUI charges based on the stipulation between the parties.

EFFECT OF ARREST (SUSPENSION/REVOCATION)

ADVISE ABOUT EFFECT OF ARREST IF NO TEST

Advise client that independent of any sentencing order, if the DMV upholds the validity of the arrest (for discussion of DMV administrative hearing, see above) and client did not take and complete a chemical test (Veh C §13353):

First Offense

License will be suspended for 1 year.

Second Offense in 10 Years

License will be revoked for 2 years.

Third or Subsequent Offense in 10 Years

License will be revoked for 3 years.

ADVISE ABOUT EFFECT OF ARREST IF TEST SHOWS OVER .08 BAC

Advise client that independent of any sentencing order, if the DMV upholds the validity of the arrest (for DMV administrative hearing, see above) and client's chemical test or breath test showed .08 percent or more BAC (Veh C §13353.3):

First Offense

License will be suspended for 4 months.

Two or More Offenses in 10 Years

License will be suspended for 1 year.

NOTE

10-year period for calculating prior separate offenses runs from date of arrest for earlier offense to date of next offense, *not* date of conviction. See Veh C §§23165, 23170, 23175, 23185, 23190, 23217, 23540, 23546, 23550, 23560, and 23566.

EFFECT OF CONVICTION – IGNITION INTERLOCK DEVICE

ADVISE CLIENT ABOUT IGNITION INTERLOCK DEVICE

Advise client that if he or she is convicted of offense, court may require DMV to prohibit driving without an ignition lock device that prevents operation of a vehicle unless an alcohol-free breath sample is first blown into the device. See Veh C §23575.

WHEN COURT CAN ORDER

First Offense

Court can require payment of cost of installation of device as a condition of probation. Pen C §1203.1bb.

One or More Offenses in 10 Years

Persons convicted of one or more offenses within 10 years may apply for a restricted driver's license requiring the installation of an ignition interlock device. See Veh C §23575(f)(1).

Further Research: For DUI cases generally, see Crim Law, chap 55.

Source: Criminal Law/Defending Your Client in a Misdemeanor Case (Including a DUI) (Action Guide)/When Special Proceedings/STEP 17. PREPARE FOR IMMIGRATION CONSEQUENCES

STEP 17. PREPARE FOR IMMIGRATION CONSEQUENCES

RECOGNIZE IMPORTANCE

Be aware that:

- a. Immigration consequences following a conviction are potentially more serious than the criminal case itself, *e.g.*, client could be:
 - (1) Deported from the country (8 USC §1227(a)(2));
 - (2) Denied citizenship; or
 - (3) Refused reentry into this country following a voluntary absence. 8 USC §1182(a)(2).
- b. Noncitizen convicted of misdemeanor will probably be deported if crime of conviction:
 - (1) Involves moral turpitude;
 - (2) Is defined as an "aggravated felony"; or
 - (3) Involves weapons, prostitution, narcotics, chronic alcoholism, or violation of a domestic violence restraining order.

Further Research: On preclusion from establishing good moral character, see 8 USC §1101(f); on inadmissibility, see 8 USC §1182(a)(2); on deportability, see 8 USC §1227(a)(2). For chart showing immigration consequences of criminal conviction, see [Crim Law §52.24](#).

DETERMINE IMMIGRATION CONSEQUENCES

Find out whether client is noncitizen and, if so, research immigration consequences to determine:

- a. Charges, if any, client *could* accept without being subject to:
 - (1) Deportation;
 - (2) Exclusion from this country; or
 - (3) Denial of naturalization.
- b. Sentence formula that would be most advantageous, *e.g.*, "imposition of sentence suspended" would generally be better than a fixed jail sentence being suspended (see [step 33](#), below).
- c. Whether offense charged involves "moral turpitude." See [Crim Law §§52.38-52.40](#).
- d. Whether offense charged is "aggravated felony." See [Crim Law §§52.41-52.47](#).
- e. Whether offense charged will be considered "aggravated felony" because of sentence length. See [Crim Law §52.42](#).

NOTE

Some crimes are considered aggravated felonies even if they are misdemeanors in state court. A one-year jail sentence for a misdemeanor often puts the case in the "aggravated felony" category.

f. If the client is charged with an aggravated felony or an offense involving "moral turpitude," can you bargain for an offense that is not an aggravated felony or that does *not* involve moral turpitude?

NOTE

When client is noncitizen, it is advisable for counsel to consult with an immigration expert about the consequences of conviction.

The Immigrant Legal Resource Center, 1663 Mission Street, Suite 602, San Francisco, CA 94103, (415) 255-9499, <http://www.ilrc.org>, provides consultation and materials for a fee. Other resources are listed in [Crim Law §52.1](#).

Further Research: Be sure to research the immigration consequences of any disposition for a noncitizen. See generally [Crim Law, chap 52](#).

WHEN CONDUCTING RESEARCH

Be aware that the area of immigration law has been dramatically changed with the passage of the Antiterrorism and Effective Death Penalty Act of 1996. See [Crim Law, chap 52](#). "Judicial Recommendations Against Deportation" (JRAD) were eliminated by the Immigration Act of 1990 (Pub L 101-649, 104 Stat 4978).

Discussions in legal resources concerning crimes of "moral turpitude" remain relevant.

JUDGE'S PERSPECTIVE

Be aware that immigration law can change substantially based on national policy considerations.

With our growing cultural diversity, you need to know what federal guidelines and case law pertain specifically to *your client's country of origin*.

ADVISE CLIENT OF IMMIGRATION CONSEQUENCES

As client's defense attorney, you *must* understand and advise client of immigration consequences. See [People v Soriano \(1987\) 194 CA3d 1470, 240 CR 328](#). Be aware that "parroted" language of [Pen C §1016.5](#) could constitute ineffective assistance of counsel. You must investigate and advise your client of the immigration consequences of all dispositions. See [People v Sandoval \(1999\) 73 CA4th 404, 86 CR2d 431](#); [In re Resendiz \(2001\) 25 C4th 230, 105 CR2d 431](#). As client's defense attorney, you *must* understand and advise client of immigration consequences. See [People v Soriano, supra](#). See resources listed in [Appendix C](#).

NOTE

The best resolution for a noncitizen client may be to avoid conviction by diversion. For discussion of diversion, see [step 34](#), below.

Further Research: On representing the noncitizen criminal defendant, see [Crim Law, chap 52](#).

STEP 18. CONSIDER WHETHER MENTAL HEALTH ISSUES WILL REQUIRE SPECIAL PROCEEDINGS

REVIEW STANDARD FOR MENTAL COMPETENCE

A client must be able to (Pen C §1367(a)):

- a. Appreciate the nature of the proceedings; and
- b. Rationally cooperate with attorney.

If Not Mentally Competent

a. If the client is not competent, the court must suspend all criminal proceedings, including sentencing. Pen C §§1367, 1367.1, 1370.01, 1201.

b. Even when proceedings are suspended, you can still proceed with certain procedural litigation. While criminal proceedings are suspended, you may litigate (Pen C §1368.1):

- (1) A demurrer;
- (2) A motion to dismiss for lack of probable cause; or
- (3) A motion to suppress evidence under Pen C §1538.5.

IF YOU HAVE A DOUBT ABOUT THE CLIENT'S COMPETENCY

If you have concerns about your client's competency:

a. You should try to explain the problem to the client (see discussion of ramifications, below), *e.g.*:

- (1) Encourage client to behave appropriately in court; and
- (2) If appropriate, advise client to seek community-based mental health services.

b. If you have serious doubts about the client's competency to stand trial, you should obtain a confidential expert's opinion before raising the issue with the judge.

RECOGNIZE RAMIFICATIONS

An "out-of-custody" client will generally be remanded to jail and evaluated for possible involuntary long-term hospitalization (see Pen C §1367.1), *if*:

- a. You inform the court that you believe your client is "mentally disordered" (Pen C §1367.1(b)); or
- b. Client's behavior or other evidence demonstrates possible "incompetence," judge asks you if you have doubt as to client's competency, and you indicate that you:

- (1) Do; or
- (2) Do not, but judge nevertheless orders client referred for evaluation and treatment.

USE CONSERVATIVELY

Express doubt as to competency in a misdemeanor case conservatively because the client will usually:

- a. Be remanded into custody; and
- b. Spend more time in jail than if convicted of the crime, *e.g.*, if there is a substantial delay in evaluating the client and holding

the competency hearing. On conduct of hearing, see "Competency Hearing," below.

IF YOU SEEK TO HAVE CLIENT DECLARED INCOMPETENT

To have client declared incompetent:

a. First, you must bring all legal challenges under:

- (1) Pen C §991 (probable cause, see step 13, above);
- (2) Pen C §1538.5 (suppression of illegally seized evidence, see step 36, below; and
- (3) Pen C §§1002-1012 (demurrers, see step 13, above); see also Appendix F.

b. Then ask for a referral for evaluation and treatment under Pen C §4011.6 (Pen C §1367.1).

c. If defendant remains incompetent, request a competency hearing under Pen C §§1368.1 and 1369. Pen C §1367.1(d).

NOTE

In Pederson v Superior Court (2003) 105 CA4th 931, 130 CR2d 289, the Court of Appeal for the Second Appellate District ruled that the precompetency determination evaluation and treatment requirement of Pen C §1367.1 denies misdemeanor defendants equal protection, and ordered the courts in its district to use the competency procedures applicable to felony defendants in misdemeanor cases.

IF COURT HAS A DOUBT ABOUT THE CLIENT'S COMPETENCY

If judge has a doubt about the mental competency of the client:

Court Asks Your Opinion

Court will ask you your opinion, and give you the opportunity to confer with the defendant in order to form that opinion. Pen C §1367.1(a).

JUDGE'S PERSPECTIVE

Even if you do not agree that a doubt exists about whether your client is mentally competent, the judge can declare that there is a doubt and begin the Pen C §4011.6 proceedings. Pen C §1367.1(b).

Court Orders Competency Hearing

After the Pen C §4011.6 evaluation is completed and treatment is ineffective, the judge may order a full hearing on competency. Pen C §1367.1(d).

JUDGE'S PERSPECTIVE

The judge's referral of the defendant for evaluation and treatment under Pen C §1367.1(c) suspends the criminal case until evaluation and treatment have been concluded. If the treatment fails, the judge's order for a competency hearing under Pen C §§1368.1 and 1369 also suspends the criminal proceedings until the client is found competent to stand trial. See Pen C §§1367.1(d), 1368(c), 1370.01(a); People v Markov (1988) 45 C3d 1335, 1340, 248 CR 874.

If your client is found mentally incompetent, avoid having your client committed beyond the maximum term provided by law by calendaring a date for return to court under Pen C §1370.01(c)(1). For how to determine the date for return, see "Return to Court," below.

COMPETENCY HEARING

Court Appoints Psychiatrist

In course of competency hearing (Pen C §1369(a)):

- a. Court appoints psychiatrist or licensed psychologist to examine the defendant.
- b. If you object and are not seeking a finding of incompetency, then two doctors, instead of just one, will be assigned to examine

your client.

NOTE

Because the consequences of a declaration of incompetency can be more severe than conviction in a misdemeanor case, it is advisable to object to the competency proceedings.

Jury Trial Available

Competency determination may be made by judge or jury. Pen C §1369.

NOTE

If you do not agree with the judge's decision to declare a doubt about the defendant's competency, it is recommended that you assert your client's right to a jury trial.

Evidence Presented

You and the prosecution present evidence on the issue of defendant's mental competence. Pen C §1369(b).

Parties Argue

Each side may make a final argument to the trier of fact. Pen C §1369(e).

Competence Decided

The mental competence is then decided by either (see Pen C §1369(f)):

- a. Judge; or
- b. Unanimous verdict of the jury.

JUDGE'S PERSPECTIVE

Make sure you clarify for the jury that a person is presumed mentally competent until it is proven by the *preponderance of the evidence* that he or she is mentally incompetent. Pen C §1369(f). See Crim Law §48.11.

IF FOUND INCOMPETENT

If misdemeanor client found incompetent (Pen C §1370.01):

Criminal Case Suspended

Trial or judgment remains suspended until client becomes competent (Pen C §1370.01(a)(1)).

County Mental Health Director Evaluates

Court orders county mental health director to (Pen C §1370.01(a)(2)):

- a. Evaluate defendant; and
- b. Within 15 judicial days of order, submit written recommendation whether client should be committed for outpatient or inpatient treatment.

Court Orders In- or Out-Patient Treatment

After evaluation by county mental health director, court:

- a. Determines whether antipsychotic medication may be administered:

- (1) With the defendant's consent (Pen C §1370.01(a)(2)(B)(I)); or
- (2) Involuntarily (Pen C §1370.01(a)(2)(B)(II)); and

- b. Orders that client be (Pen C §1370.01(a)(2)(A)):

- (1) Confined in a treatment facility *other* than state hospital, unless no less restrictive placement is available; *or*
- (2) Placed in out-patient status.

Progress Reports

Within 90 days of commitment, medical director of treatment facility or outpatient staff must (Pen C §1370.01(b)):

- a. Report on client's progress toward recovery; and
- b. Send copy of the reports to the court, which will send copies to you and to the prosecutor.

Return to Court

Client returns to court:

- a. *If competence regained*: Within 10 days after certificate of return to competence is filed (Pen C §§1370.01(a), 1372(a)).
- b. *If competence not regained*: At end of the shorter of (Pen C §1370.01(c)(1)):
 - (1) 1 year from date of commitment; or
 - (2) Period of commitment equal to maximum term of imprisonment for most serious offense charged, on a day-for-day basis.

If Client Gravely Disabled

If, on return to court, client is gravely disabled as defined in Welf & I C §5008, court shall order institution of conservatorship proceedings (Pen C §1370.01(c)(2)).

Dismissal of Criminal Charges

- a. The court may order dismissal of criminal charges under Pen C §1385 (Pen C §1370.01(d)).
- b. If criminal charges are dismissed, client may still be subject to civil commitment proceedings. Pen C §1370.01(e).

NOTE

If client is developmentally disabled, proceed under Pen C §1370.1. See step 34, below.

Further Research: For discussion of mental competence issues generally, see Crim Law §§48.3-48.22A.

Source: Criminal Law/Defending Your Client in a Misdemeanor Case (Including a DUI) (Action Guide)/When Special Proceedings/STEP 19. DETERMINE WHETHER CLIENT COULD LOSE PROFESSIONAL LICENSE IF CONVICTED

STEP 19. DETERMINE WHETHER CLIENT COULD LOSE PROFESSIONAL LICENSE IF CONVICTED

DETERMINE WHETHER CLIENT HAS PROFESSIONAL LICENSE

Ask client if he or she has a professional license, and review the license requirements.

RESEARCH RAMIFICATIONS OF CONVICTION

Research whether your client will lose professional license if convicted of the alleged crime.

Example 1: If the client is convicted of a crime of moral turpitude, client could be barred from working in a bank. See 12 USC §1829.

Example 2: If the client has a weapons conviction, the client could be barred from being licensed to carry a gun.

Further Research: See Bus & P C §§480-493 for licensing problems when the crime is substantially related to the qualifications, functions, and duties of the licensed job. See also Crim Defense Prac §93.06; Crim Law, chap 53.

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Source: Criminal Law/Defending Your Client in a Misdemeanor Case (Including a DUI) (Action Guide)/When Investigating Case/STEP 20. PLAN YOUR INVESTIGATION OF THE CASE

When Investigating Case

STEP 20. PLAN YOUR INVESTIGATION OF THE CASE

OBJECTIVE

- a. Thoroughly investigate case to effectively represent your client.
- b. Meet your professional responsibility to provide competent representation (see, e.g., People v Jackson (1986) 187 CA3d 499, 231 CR 889, disapproved on other grounds in People v Jones (1991) 53 C3d 1115, 1144, 282 CR 465 (representation found inadequate when counsel failed to have investigator talk to own witness)).

INCLUDE IN INVESTIGATION

You must:

- a. Interview your client (see step 21, below);
- b. Review all of the prosecution's evidence (see steps 28-29, below);
- c. Investigate:
 - (1) Witnesses (see step 22, below);
 - (2) Locations (see step 23, below);
 - (3) Any real evidence, e.g., fingerprints, fibers (see step 23, below); and
 - (4) Any evidence you discover from the prosecution, e.g., results of fingerprint analysis, fiber analysis, measurements of the scene of the crime (see step 28, below);
- d. Conduct legal research into:
 - (1) Charge; and
 - (2) All defenses;
- e. Investigate all potential legal and factual defenses (see People v Pope (1979) 23 C3d 412, 152 CR 732); and
- f. Investigate all immigration and professional consequences. See People v Soriano (1987) 194 CA3d 1470, 240 CR 328.

CONSIDER HIRING AN INVESTIGATOR

If you need assistance with investigation and interviewing, find an expert or investigator, e.g.:

- a. Obtain referrals from:
 - (1) Local bar association;
 - (2) Criminal defense organizations; or
 - (3) Other criminal law practitioners.
- b. Interview and establish a working relationship with an investigator. For when you will need an investigator, see step 10, above.

IF CLIENT INDIGENT, REQUEST COURT RESOURCES

If the client is indigent, ask court for investigative assistance. See Corenewsky v Superior Court (1984) 36 C3d 307, 204 CR 165; Evid C §§730-731; and step 30, below.

RECOGNIZE CONFIDENTIALITY OF YOUR INVESTIGATION

Do not disclose (*e.g.*, to the prosecution) witnesses, evidence, or related information because:

- a. Defendant has the constitutional right to remain silent (US Const amend V);
- b. You have professional obligation not to reveal anything defendant has told you in the attorney-client relationship (Evid C §§950-962); and
- c. Prosecution has the burden to prove defendant guilty beyond a reasonable doubt. Pen C §1096.

When to Disclose

For discussion of when you as defense counsel must disclose information to the prosecution, see step 27, below.

RECOGNIZE COURT'S ROLE IN CASE

The judge will play several key roles in the investigation process:

- a. If client is indigent, judge can order that necessary resources be provided by state (see Evid C §§730-731; see also step 30, below);
- b. If prosecution is not providing you with appropriate discovery, judge can impose sanctions, including (Pen C §1054.5; see step 29, below):
 - (1) Granting a continuance;
 - (2) Excluding evidence from trial; or
 - (3) Dismissing the charges; and
- c. Judge could be asked by prosecutor to compel *you* to disclose evidence under Pen C §§1054.3 and 1054.5. See steps 27-29, below.

Further Research: For discussion of discovery, see Crim Law, chap 11.

Source: Criminal Law/Defending Your Client in a Misdemeanor Case (Including a DUI) (Action Guide)/When Investigating Case/STEP 21. CONDUCT CLIENT INTERVIEW

STEP 21. CONDUCT CLIENT INTERVIEW

YOUR INTERVIEW GOALS

Obtain Information

To adequately prepare your case, you must:

- a. Understand your client's side of case;
- b. Obtain names, addresses, and phone numbers of defense witnesses to the alleged offense;
- c. Obtain names, addresses, and phone numbers of character witnesses; and
- d. Obtain information you will need to pursue disposition alternatives (see, *e.g.*, [step 17](#) (immigration issues), above, and [step 34](#) (diversion), below).

Educate Client

Explain the law and facts to the client.

OBTAIN FACTS

- a. Initially, obtain an overview of the factual situation, including any witnesses client believes may be helpful.
- b. Conduct a detailed interview with client as soon as possible to ascertain and address investigation needs.
- c. Go to the scene of the alleged offense.

NOTE

Some attorneys recommend not conducting a detailed interview because of potential ethical problems if the client makes incriminating statements and later wants to testify inconsistently with those statements. See *Nix v Whiteside* (1986) 475 US 157, 89 L Ed 2d 123, 106 S Ct 988 (attorney has duty not to encourage perjury). However, the author strongly believes that the only reliable way for counsel to ascertain if there are any defenses or mitigating circumstances is to get the complete story from the client.

BE A GOOD LISTENER

Be a good listener; do not simply tell client what you think client ought to know, *e.g.*, listen to client's questions to gain a better understanding of what client values most in resolving the case.

Example: Client may be concerned that diversion under [Pen C §§1001-1001.9](#) means that client is admitting guilt. By listening to what the client is most concerned with in this case, you may discover that you need to explain that diversion does not mean client is admitting guilt. For discussion of diversion, see [step 34](#), below.

EXPLAIN LAW AND FACTS TO CLIENT

You will also need to be a good teacher. Give your client a clear understanding of the law and the facts, *e.g.*, explain to client:

- a. The charges;
- b. All possible defenses;
- c. Best and worst penalties;
- d. Court and other criminal procedures; and

e. Accusations being made by others, including the results of tests and contents of reports.

CAUTION CLIENT NOT TO TALK TO OTHERS

Impress on your client that he or she must *not* talk about the case with *anyone* else, even though most clients will find this unnatural.

NOTE

Point out to in-custody clients that nonattorney phone calls are subject to tape recording, and that nonattorney writings in their cells may be subject to search and seizure. See Pen C §2600; *Lanza v New York* (1962) 370 US 139, 143, 8 L Ed 2d 384, 388, 82 S Ct 1218; *People v Lloyd* (2002) 27 C4th 997, 119 CR2d 360.

Effect

If you have done your job, and the case goes to trial:

- a. Client will be able to honestly state that he or she remained silent on your advice; and
- b. You will not have the embarrassment of other witnesses attempting to recall what your client said on some past occasion.

NOTE

Remind client not to talk to anyone during the trial, *e.g.*, in the hallways, bathrooms, local coffee shop.

CLIENT STATEMENTS TO OTHERS

DETERMINE WHETHER CLIENT HAS TALKED TO ANYONE

Ask whether client spoke to anyone about the criminal case, and if so, to whom, *e.g.*, whether client made statements to:

- a. Witnesses;
- b. Police; or
- c. Friends and family.

DETERMINE WHAT CLIENT TOLD OTHERS

- a. Ask client what was said, *but* independently investigate by interviewing witnesses to determine what the witness remembers.
- b. Review police reports.

RESEARCH ADMISSIBILITY

Research the admissibility of these statements at trial.

Further Research: On confessions and admissions generally, see Crim Law, chap 23.

CLIENT STATEMENTS TO PROSECUTION

CAUTION CLIENT NOT TO TALK TO PROSECUTION

Your client should not make any statements to the prosecution, *e.g.*:

Client Initiated

Explain that even in petty misdemeanor offenses client should not talk casually with the prosecution, because prosecutor has legal right to use any of client's statements to help prove guilt. See Crim Law §§23.1-23.5, 23.38-23.40.

Prosecution Initiated

Prosecutors understand that it is unethical for them to initiate conversation with a criminal defendant, *but* you should tell your client not to talk to prosecutor under any circumstances. See Crim Law §23.44.

IF CLIENT HAS TALKED TO PROSECUTOR

If client has talked to prosecution and prosecutor tries to have contents of conversation admitted as evidence, argue that there are significant legal problems, including defendant's:

- a. Right to counsel; and
- b. Right to remain silent.

JUDGE'S PERSPECTIVE

Whether prosecutor acknowledges or denies conversation occurred, based on your client's representation of the conversation, consider whether the conversation has created a conflict of interest for the prosecutor that would prevent your client from receiving a fair trial:

- a. Discuss contents of the conversation with your client.
- b. Review law on recusal of prosecutors. See Pen C §1424; Crim Law §§18.26-18.31.

If you decide a conflict does exist, consider a motion to disqualify or recuse that prosecutor or prosecutorial agency. See step 36, below.

STATEMENT TO PROBATION/PAROLE OFFICERS

WHEN ARISES

When client is on probation or parole *and* is charged with a new offense, the new offense should be "explained" to the officer so that client can:

- a. Avoid having probation/parole revoked (see Pen C §1203.2); or
- b. Get a probation/parole "hold" lifted. See step 8.

CAUTION CLIENT NOT TO TALK TO PROBATION/PAROLE OFFICERS

Make sure client knows that:

- a. If client explains the situation, his or her right to remain silent is waived; and
- b. Probation or parole officer will generally relay any explanation to prosecutor.

Further Research: See Crim Law, chap 4 and §23.5.

YOU EXPLAIN NEW ARREST TO OFFICER

The easiest way to explain new arrest, while avoiding waiver of right to remain silent or disclosure of information to prosecutor, is for you to talk to the parole or probation officer, *e.g.*:

- a. Inform the officer that your client has been instructed *not* to make any statements concerning the new arrest; and
- b. Consider explaining either:
 - (1) Circumstances of the new arrest; or
 - (2) That you and your client cannot talk about the new arrest until the charge is resolved.

EXPECT OFFICER TO COOPERATE

Most officers:

- a. Understand that client must remain silent on the new charge; and
- b. Will not act punitively toward the client, *e.g.*, insist on revoking probation simply because of the client's silence.

Further Research: For general discussion of right to counsel, see Crim Law §§3.2-3.6.

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Source: Criminal Law/Defending Your Client in a Misdemeanor Case (Including a DUI) (Action Guide)/When Investigating Case/STEP 22. INTERVIEW WITNESSES

STEP 22. INTERVIEW WITNESSES

DECIDE WHICH WITNESSES TO INTERVIEW

In deciding which witnesses to interview:

- a. Make a preliminary assessment of your case based on, *e.g.*:
 - (1) Client interview;
 - (2) Police report.
- b. Interview both positive and negative witnesses so that you are fully prepared to:
 - (1) Negotiate to resolve the case before trial; or
 - (2) Defend client at trial.

CONSIDER REASONS TO INTERVIEW

Positive Witnesses

It is important to get detailed accounts of the incident from positive witnesses to help you prepare your defense.

Negative Witnesses

It is equally important to get a detailed account of the incident from a negative witness to provide a basis for impeaching the witness at trial by:

- a. Showing bias of witness;
- b. Obtaining a statement that is inconsistent with witness's testimony at trial; or
- c. Understanding the negative aspects of the case to determine whether you should:
 - (1) Try to settle the case before trial (*i.e.*, seek an early "disposition," see [step 32](#), below), *e.g.*, to avoid having to rebut negative evidence at trial; or
 - (2) Develop trial tactics to lessen impact of negative facts, *e.g.*, find rehabilitating evidence.

NOTE

More often than not, a witness has more to say than what is contained in the initial reports.

HAVE INVESTIGATOR CONDUCT INTERVIEW

You and investigator or investigator alone should interview witness, because:

- a. If the witness is unavailable or turns hostile, you will need to call interviewer to testify at trial (see, *e.g.*, [Evid C §§770, 791, 1235-1236](#)); and
- b. As trial attorney, you should not call yourself as a witness. See Cal Rules of Prof Cond 5-210.

WHEN TO INTERVIEW

Interview witnesses as soon as possible, before witnesses' memories fade or witnesses disappear.

Source: Criminal Law/Defending Your Client in a Misdemeanor Case (Including a DUI) (Action Guide)/When Investigating Case/STEP 23. LOCATE AND PRESERVE PHYSICAL EVIDENCE

STEP 23. LOCATE AND PRESERVE PHYSICAL EVIDENCE

DETERMINE WHETHER YOU NEED ADDITIONAL PHYSICAL EVIDENCE

- a. Consider whether there is any additional physical evidence (*e.g.*, photographs, measurements) that you need to gather. For discussion of physical evidence, see [step 10](#), above.
- b. Always go to the crime scene.

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Source: Criminal Law/Defending Your Client in a Misdemeanor Case (Including a DUI) (Action Guide)/When Investigating Case/STEP 24. PREPARE SUBPOENA FOR WITNESSES

STEP 24. PREPARE SUBPOENA FOR WITNESSES

WHEN APPROPRIATE

Use subpoena to compel a witness to attend and testify at trial.

OBTAIN BLANK SUBPOENA FORMS

Blank subpoena forms (Judicial Council Form 982(a)(16)) may be obtained from, *e.g.*:

- a. Court clerk;
- b. Judicial Council website, <http://www.courtinfo.ca.gov/cgi-bin/forms.cgi>;
- c. A software program, such as SmartLaser (Cal CEB Software).

NOTE

Use of the Judicial Council's subpoena form for criminal and juvenile cases is mandatory.

COMPLETE SUBPOENA

On the subpoena form, fill in the time and place of appearance.

ISSUE SUBPOENA FORMS

You Issue

If prospective witness is less than 150 miles from the court, issue subpoena yourself by signing it as an attorney. Pen C §§1326(a)(4), 1330.

Court Issues

If prospective witness is more than 150 miles from the court, you must ask trial court to issue subpoena. Pen C §1330.

JUDGE'S PERSPECTIVE

When you ask the court to sign the subpoena, you must submit an affidavit stating why the evidence from the witness is material and attendance by the witness is necessary. See Pen C §1330.

SERVE WITNESS

Personally Serve

You should personally serve prospective witness to be sure witness (Pen C §1328(a)):

- a. Receives subpoena; and
- b. Will attend trial.

Serve by Mail

Service by mail is permitted but disfavored. You may serve witness by mail if you (Pen C §1328d):

- a. Verify that the witness received the subpoena by either:
 - (1) Contacting witness by phone;
 - (2) Asking witness to mail to you an acknowledgement of receipt; or

(3) Talking to the witness in person.

b. Obtain from witness identification information including:

(1) Birth date; AND

(2) Driver's license number or DMV identification number.

JUDGE'S PERSPECTIVE

Make a written notation of the birth date and driver's license number or DMV identification number, if you verify service by phone or in person. Pen C §1328d.

EFFECT IF WITNESS FAILS TO APPEAR

If the witness does not appear as ordered in the subpoena:

If Personally Served

a. Court may hold witness in contempt, if subpoena personally served (Pen C §1331; CCP §1212).

b. Court may issue a warrant or body attachment to compel the witness to attend (Pen C §1328d; CCP §1993).

JUDGE'S PERSPECTIVE

If you properly serve a witness who is a minor (see Pen C §1328 (serve parent, guardian, or others)), and the person served willfully fails to produce the minor, the person served may be held in contempt under CCP §1218. See Pen C §1328.

If Served by Mail

a. Court cannot issue an arrest warrant or body attachment.

b. Ask for a brief continuance to serve witness personally. Pen C §1328d.

JUDGE'S PERSPECTIVE

If witness fails to appear, and you do *not* want your client's witness to be arrested immediately:

a. Ask judge to issue warrant but hold it until a specific day to give you an opportunity to contact witness and persuade him or her to appear in court voluntarily. See CCP §1993.

b. If witness still fails to appear, inform court so that warrant can be released (also give clerk identifying information about witness, *e.g.*, date of birth, description).

c. If witness voluntarily appears, move to have warrant quashed and recalled.

AGREE WITH WITNESS ABOUT WHEN TO APPEAR

After witness is served with subpoena, you may agree to place witness on standby (Pen C §1331.5) to give:

a. Witness more flexibility to conduct normal business; and

b. You more flexibility in presenting your case.

JUDGE'S PERSPECTIVE

If you *know* a witness will be unavailable, give notice to the court and the prosecution *before* the day the witness is supposed to appear (see Pen C §1050(b)) to avoid the court imposing sanctions on you for delaying trial (see Pen C §1050.5).

WHEN TO SERVE

Police Officers

5 working days before you want police officer to appear, serve the officer through the police department under Pen C §1328.

Other Witnesses

Early enough to allow the witness a reasonable time for preparation and travel to court. CCP §1987(a).

IF WITNESS OUT OF STATE

To compel attendance of out-of-state witnesses (Pen C §§1334-1334.6):

- a. Obtain certificate from trial judge indicating that out-of-state witness is required for trial;
- b. Arrange for out-of-state court to order person to appear at a specified time for trial; and
- c. Advance expenses to witness. See Pen C §1334.2.

IF WITNESS INCARCERATED

To compel an incarcerated witness to be brought to court, present an affidavit to the court for an order, directed to the state prison warden or county sheriff, to produce the witness. Pen C §§1567, 2621.

Further Research: See Crim Law, chap 4.

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Source: Criminal Law/Defending Your Client in a Misdemeanor Case (Including a DUI) (Action Guide)/When Investigating Case/STEP 25. REVIEW DOCUMENTS AND EVIDENCE AND PREPARE SUBPOENA, IF NECESSARY

STEP 25. REVIEW DOCUMENTS AND EVIDENCE AND PREPARE SUBPOENA, IF NECESSARY

OBTAIN RECORDS BEFORE TRIAL

Obtain any relevant records to determine whether you might use them at trial, *e.g.*:

Without Subpoena

Ask for copies of the records directly from the witness *before* issuing subpoena duces tecum, *e.g.*, use a medical or other release form from your client to obtain your client's records directly from a third party.

With Subpoena

When nonparty witness will not give you documents without subpoena:

- a. Subpoena must direct that records be delivered to court. See Evid C §1560(b)-(d); Pen C §1326(b)-(c).
- b. You should request court to hold in camera hearing to determine whether you are entitled to records. Pen C §1054.3.
- c. You should be sure to subpoena the documents *early enough before trial* so that you can:
 - (1) Evaluate the usefulness of the information; and
 - (2) Subpoena any supplemental witnesses necessary to introduce the evidence at trial.

NOTE

The court may not order the records disclosed to the prosecution except in accordance with Pen C §1054.3. Pen C §1326(c). See *Teal v Superior Court* (2004) 117 CA4th 488, 492, 11 CR3d 784.

If you are concerned that the witness may disclose privileged information in the records to the prosecutor, ask court to restrict disclosure to you until after you have evaluated whether the information is relevant or material.

Further Research: See Crim Law §§4.39, 4.44, 11.9-11.12, 11.14, 11.16, and 11.22.

IF RECORDS NEEDED FOR TRIAL

Stipulation

Consider stipulating with prosecuting attorney to allow you to use copies of the documents at trial, without calling the custodian of records or other authenticating witness.

Subpoena for Personal Attendance

If no stipulation, or if you want custodian to personally attend, use subpoena duces tecum and check the relevant box on the subpoena form ordering custodian to:

- a. Attend; and
- b. Produce originals for trial.

If Custodian Not Necessary

If you want copies of business records *without* the personal appearance of the witness, check the relevant box on the subpoena form, and custodian will (Evid C §§1560-1561):

- a. Prepare declaration stating that:

- (1) Affiant has authority to certify the records (Evid C §1561(a)(1)); AND
- (2) Records are true copies of all the documents described in the subpoena (Evid C §1561(a)(2)); AND
- (3) Records were prepared by business personnel in the ordinary course of business at or near the time of the:
 - (a) Act;
 - (b) Condition; or
 - (c) Event (Evid C §1561(a)(3)); AND
- (4) If the business has only part or none of the business records requested by the subpoena, the custodian shall so state and deliver the available records (Evid C §1561(b)); and
- (5) Deliver records in a sealed envelope to the court (Evid C §1560).

TO ISSUE SUBPOENA DUCES TECUM

Obtain blank subpoena (Judicial Council Form 982(a)(16)) from, *e.g.*:

- a. Court clerk;
- b. Judicial Council website, <http://www.courtinfo.ca.gov/cgi-bin/forms.cgi>; or
- c. A software program, such as SmartLaser (Cal CEB Software).

NOTE

Use of the Judicial Council's subpoena form for criminal and juvenile cases is mandatory.

Complete Subpoena

On the subpoena:

- a. Fill in time and place of appearance; and
- b. Check appropriate box telling witness how to produce the physical evidence.

NOTE

A subpoena duces tecum issued to a nonparty must direct that the records be delivered to the court. The court will then hold a hearing (which may be in camera) to determine whether the requesting party is entitled to receive the records sought. Evid C §1560(b); Pen C §1326(b)-(c).

Prepare Declaration

- a. Prepare a declaration that establishes "good cause" for production. CCP §§1985, 1987.5.
- b. The declaration should:
 - (1) Describe specifically what records, documents, or other items you want produced;
 - (2) State the reason you need the items you describe;
 - (3) State that the person being subpoenaed controls the items you describe; and
 - (4) Show that the items subpoenaed contain (or will lead to) evidence that is:
 - (a) Competent; and
 - (b) Admissible evidence at trial.

NOTE

There is no Judicial Council form for a declaration meeting the requirements of CCP §§1985 and 1987.5.

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Source: Criminal Law/Defending Your Client in a Misdemeanor Case (Including a DUI) (Action Guide)/When Investigating Case/STEP 26. REVIEW RECIPROCAL DISCOVERY REQUIREMENTS

STEP 26. REVIEW RECIPROCAL DISCOVERY REQUIREMENTS

DISCOVERY OVERVIEW

What Must Be Disclosed

Under Pen C §1054.3, both the prosecution and defense have an obligation to disclose to the opposing party:

- a. Names and addresses of witnesses the party intends to use at trial.

JUDGE'S PERSPECTIVE

Be careful not to disclose the addresses or phone numbers of prosecution witnesses to your client, unless the court permits you to do so after a hearing and showing of good cause. See Pen C §1054.2.

- a. The existence of a felony conviction of any witnesses whose credibility is likely to be critical to the outcome of the trial.
- b. Prior acts of witnesses that adversely reflect on their credibility or honesty, whether or not such acts resulted in felony or misdemeanor convictions. See People v Wheeler (1992) 4 C4th 284, 14 CR2d 418; People v Santos (1994) 30 CA4th 169, 35 CR2d 719.

JUDGE'S PERSPECTIVE

Felony convictions may be admissible to impeach a witness under Cal Const art I, §28(f) and Evid C §788. Under Evid C §452.5(b), misdemeanor convictions may be admissible for this purpose as well. People v Duran (2002) 97 CA4th 1448, 1460, 119 CR2d 272.

- a. Statements of witnesses.

NOTE

The parties are required to produce statements of witnesses they intend to call at trial, even if they do not intend to use the statements. See Pen C §1054.3.

- b. Evidence that the party intends to use at trial.

NOTE

The phrase "intends to use" has been construed to mean "reasonably anticipates using." Izazaga v Superior Court (1991) 54 C3d 356, 376 n11, 285 CR 231.

Further Research: See Cal Const art I, §30(c); In re Littlefield (1993) 5 C4th 122, 132, 19 CR2d 248; Hobbs v Municipal Court (1991) 233 CA3d 670, 695, 284 CR 655, disapproved on other grounds in People v Tillis (1998) 18 C4th 284, 295, 75 CR2d 447 (reciprocal discovery provisions apply to misdemeanors); Hubbard v Superior Court (1997) 66 CA4th 1163, 1167, 78 CR2d 819. For further discussion of defendant's obligations under Pen C §§1054-1054.10, see Crim Law §§11.9-11.11.

NOTE

On the prosecution's obligation to disclose exculpatory material, see "Disclosure of Information Favorable to Accused," step 27, below.

What Need Not Be Disclosed

Neither the prosecution nor the defense is required to divulge:

- a. Any witness or evidence the party does not reasonably anticipate using at trial. Pen C §1054.3; Izazaga v Superior Court (1991) 54 C3d 356, 376 n11, 285 CR 231.

b. Impeachment evidence that may be used on cross-examination of opposing witnesses. People v Tillis (1998) 18 C4th 284, 75 CR2d 447; Hubbard v Superior Court (1997) 66 CA4th 1163, 1167, 78 CR2d 819.

c. Work product (CCP §2018.030(a)), *e.g.*, writing that reflects attorney's (Pen C §1054.6):

- (1) Impressions;
- (2) Conclusions;
- (3) Legal research; or
- (4) Legal theories.

d. Information privileged under (Pen C §1054.6), *e.g.*:

- (1) Express statutory provision, *e.g.*:
 - (a) Attorney-client privilege (Evid C §§950-962);
 - (b) Privilege not to disclose identity of informant (Evid C §§1041-1042); or
- (2) United States Constitution, *e.g.*, privilege against self-incrimination. US Const amend V.

NOTE

A party may be required to disclose or produce materials obtained or prepared for the case (*i.e.*, "conditional" work product) if (1) they are not listed in CCP §2018.030(a) and (2) the court determines that denial of disclosure would result in undue prejudice or injustice to the party requesting disclosure. Pen C §1054.6.

Further Research: On discovery in criminal cases generally, see Crim Law, chap 11.

Source: Criminal Law/Defending Your Client in a Misdemeanor Case (Including a DUI) (Action Guide)/When Investigating Case/STEP 27. OBTAIN DISCOVERY FROM PROSECUTION AND LAW ENFORCEMENT

STEP 27. OBTAIN DISCOVERY FROM PROSECUTION AND LAW ENFORCEMENT

REVIEW LOCAL RULES

Some jurisdictions have local rules or policies concerning discovery procedures.

MAKE INFORMAL REQUEST

Always:

- a. Request discovery under Pen C §1054.5;
- b. Document request in writing;
- c. Keep a record of information received or given; and
- d. Remember that you must make informal discovery request *before* you can ask court to order discovery. Pen C §1054.5(b). See step 29, below.

Sample Form: For sample discovery request, see Appendix G.

NOTE

A defense attorney's failure to make an informal request for discovery may be viewed as ineffective assistance of counsel.

AT ARRAIGNMENT

WHAT PROSECUTOR SHOULD PROVIDE

Defendant should automatically receive a copy of (Pen C §§988, 991):

- a. Complaint; and
- b. List of witnesses.

See step 15, above.

OTHER DOCUMENTS

If the client is incarcerated, demand probable cause hearing at the time of arraignment (see step 13, above) to force prosecution to provide to judge (Pen C §991), *e.g.*:

- a. Police reports;
- b. Arrest reports; and
- c. Crime reports.

HOW TO OBTAIN INFORMATION

If prosecutor does not automatically supply, contact and ask for discovery. See step 15, above.

DISCOVERY UNDER PEN C §§1054-1054.10

WHAT PROSECUTOR SHOULD PROVIDE

If prosecutor has, or knows that the investigating agency has, prosecutor must provide (Pen C §1054.1):

Witness Information

Names and addresses of persons the prosecution reasonably anticipates calling as witnesses at trial.

Evidence

- a. Statements of all defendants;
- b. All relevant real evidence obtained during the investigation;
- c. Any exculpatory evidence; and
- d. If prosecutor reasonably anticipates calling witness or introducing evidence at trial, relevant written or recorded:
 - (1) Statements of witnesses or reports of statements of witnesses, including experts; and
 - (2) Results of:
 - (a) Physical or mental examinations; and
 - (b) Scientific tests, experiments, or comparisons.

HOW TO OBTAIN INFORMATION

- a. Prosecutor may supply information.

If not:

- b. Make informal discovery request; and
- c. Follow it with motion to compel, if necessary. Pen C §§1054.1, 1054.5.

PROSECUTOR'S DISCLOSURE DEADLINE

Prosecutor should provide discoverable information (see Pen C §1054.2) (Pen C §1054.7):

- a. Within **15** calendar days after informal request is made (Pen C §1054.5(c)); or
- b. No later than **30** days before trial (Pen C §1054.7), unless prosecutor shows good cause why disclosure should be:
 - (1) Denied;
 - (2) Restricted; or
 - (3) Deferred; or
- c. If information received within **30** days before trial, as soon as prosecutor receives it.

JUDGE'S PERSPECTIVE

The court may deny or regulate discovery if prosecutor shows "good cause" (Pen C §1054.7), *i.e.*:

- a. Threats or possible danger to the safety of a victim or witness;
- b. Possible loss or destruction of evidence; or
- c. Possible compromise of other law enforcement investigations.

Further Research: See In re Littlefield (1993) 5 C4th 122, 133, 19 CR2d 248 (duty to disclose names of witnesses includes duty to disclose addresses if known or reasonably accessible).

PROSECUTOR'S DUTY TO PROVIDE EXCULPATORY INFORMATION

Due process requires the prosecutor to provide information favorable to the defendant and material to guilt or punishment. US Const amend V; *Brady v Maryland* (1963) 373 US 83, 10 L Ed 2d 215, 83 S Ct 1194.

SCOPE OF DUTY

a. Exculpatory information includes:

- (1) Impeachment material (*U.S. v Bagley* (1985) 473 US 667, 87 L Ed 2d 481, 105 S Ct 3375);
- (2) Identity and whereabouts of material informants (*People v Goliday* (1973) 8 C3d 771, 783, 106 CR 113; *Renzi v Virginia* (4th Cir 1986) 794 F2d 155); see Evid C §§1041-1042; and
- (3) Prior acts of witness that adversely reflect on his or her credibility or honesty, whether or not such act resulted in felony or misdemeanor conviction. *People v Wheeler* (1992) 4 C4th 284, 14 CR2d 418; Cal Const art I, §28(d).

b. The duty to provide exculpatory materials:

- (1) Exists independent of any request by defendant;
- (2) Requires disclosure when the prosecution knows or *reasonably should know* that such information exists;
- (3) Extends to information the prosecution does not intend to use at trial; and
- (4) Is ongoing, *i.e.*, it continues throughout the proceedings and beyond.

Further Research: For further discussion of *Brady* discovery, see Crim Law §11.26. For discussion of motion to compel disclosure of identity of informant, see step 36, below; see also Crim Law, chap 17. On other constitutionally compelled disclosures, see step 36, below; see also Crim Law §§11.27-11.29.

HOW TO OBTAIN INFORMATION

Although the prosecution should make constitutionally required disclosures whether or not you make a request, it is better practice to make and document a request.

NOTE

Be aware that the failure to provide *Brady* material can result in the reversal of a conviction. *People v Robinson* (1995) 31 CA4th 494, 37 CR2d 183; see Crim Law §11.26. Be aware, too, that prosecutor may assert privilege concerning informants at an in chambers hearing. Evid C §§1041-1042.

JUDGE'S PERSPECTIVE

If the prosecutor refuses to disclose an informant's identity, asserting that the information is privileged (Evid C §1041) or that the informant is not a material witness to guilt or innocence, you will need to bring a motion to compel disclosure. See Pen C §1054.5; see also step 36, below.

OBTAINING LAW ENFORCEMENT RECORDS UNDER GOVT C §6254(f)

WHAT LAW ENFORCEMENT SHOULD PROVIDE ON PROPER REQUEST

Law enforcement agencies should provide (Govt C §6254(f)):

- a. Name, addresses, and other personal information about defendant.
- b. Circumstances of the arrest and the offense.

- c. Information about complaints to or requests for assistance from law enforcement or emergency personnel, including:
 - (1) Time, date, and location of the occurrence; and
 - (2) Time and date of the report about the occurrence by the law enforcement or emergency personnel.
- d. Name, age, and current address of the victim (except in sexual assault cases).

NOTE

You are prohibited from disclosing the address or phone number of the victim to *defendant* when prosecution provides it to you under Pen C §1054.1. Pen C §1054.2.

- e. Facts about the crime or incident.
- f. General description of any:
 - (1) Injuries;
 - (2) Property; or
 - (3) Weapons involved.

HOW TO OBTAIN INFORMATION

If prosecutor does not supply information after normal discovery request, use a subpoena duces tecum. See Crim Law §§4.44 and 11.25.

Pitchess DISCOVERY motion (EVID C §§1043-1047)

WHAT INFORMATION SHOULD BE PROVIDED

On proper showing, the government entity employing law enforcement or custodial officer involved in defendant's arrest should disclose information from the officer's personnel records, including complaints lodged by citizens against the officer for:

- a. Use of excessive force;
- b. Violence;
- c. Bigotry; or
- d. Other conduct unbecoming an officer.

Further Research: See *Pitchess v Superior Court* (1974) 11 C3d 531, 113 CR 897.

HOW TO OBTAIN INFORMATION

To obtain information:

- a. Prepare a written motion for discovery of police records relating to your case, setting a time and date for hearing on the motion.
- b. Prepare a declaration showing good cause for the discovery, *i.e.*:
 - (1) Set forth the allegation, *e.g.*, that officer used excessive force; and
 - (2) Show that records are material to that issue.
- c. Attach a copy of the police report to the motion if the issue is excessive force (Evid C §1046).
- d. Serve the motion on legal department of responsible law enforcement agency.

NOTE

The prosecution is entitled to notice of the date, time, and place of the hearing on the *Pitchess* motion, but not its substance. *Alford v Superior Court* (2003) 29 C4th 1033, 1044, 130 CR2d 672.

- e. File the original with the court clerk at least 16 court days before the hearing. Evid C §1043(a); CCP §1005(b).
- f. Provide a courtesy copy for the judge.

You do not need to make an informal request (compare step 29, below) for personnel records of a police officer before making this motion. Compare Evid C §§1043-1047 with Pen C §1054.5.

JUDGE'S PERSPECTIVE

Make sure that you serve the law enforcement agency that has custody and control of the records you seek. The court will not hear the motion if you have served the wrong agency.

Request only records that are relevant to the issues of your case! See Evid C §1045.

Further Research: For further discussion of *Pitchess* procedures, see Crim Law §§11.19-11.24.

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STEP 28. OBTAIN EVIDENCE FROM PROSECUTION AND LAW ENFORCEMENT

MAKE INFORMAL REQUEST FOR DISCOVERY

If you do not receive discovery from prosecutor, or even if prosecutor supplies some discovery without request, be sure that you make an informal request that prosecutor comply with Pen C §1054.1. Pen C §1054.5. See also steps 15 and 27, above.

NOTE

You must make an informal request before seeking court order to enforce compliance with discovery provisions. Pen C §1054.5.

WHEN PROSECUTOR MUST COMPLY WITH REQUEST

Prosecutor must comply:

- a. Within **15** days of informal request (Pen C §1054.5(b)); but
- b. No later than **30** days before trial (Pen C §1054.7).

JUDGE'S PERSPECTIVE

In the absence of unusual circumstances, it is unlikely that the court will consider a motion to compel sooner than **15** days after an informal request.

- a. If information received less than **30** days before trial, immediately on receipt.

IF PROSECUTOR DOES NOT COMPLY

If prosecution does not comply with informal request, ask court to make any order necessary to enforce compliance with the discovery statute (Pen C §1054.5(b)), including:

- a. Order for immediate disclosure of information;
- b. Initiation of contempt proceedings;
- c. Delaying or prohibiting:
 - (1) Testimony of witness; or
 - (2) Presentation of real evidence;
- d. Continuing trial of the matter;
- e. Advising jury of prosecutor's failure or refusal to disclose; and
- f. Any other order, *e.g.*, dismissal of the charge. Pen C §1054.5(c).

JUDGE'S PERSPECTIVE

Request lesser sanctions *before* you request that testimony be prohibited. See Pen C §1054.5(c) (all other sanctions must be exhausted).

If you request dismissal of a charge, be prepared with statutory and case authority supporting the request, because the court cannot dismiss unless "required to do so by the Constitution of the United States." See Pen C §1054.5(c).

Further Research: See Crim Law §11.17.

Source: Criminal Law/Defending Your Client in a Misdemeanor Case (Including a DUI) (Action Guide)/When Investigating Case/STEP 29. PROVIDE DISCOVERY TO PROSECUTOR

STEP 29. PROVIDE DISCOVERY TO PROSECUTOR

RECIPROCAL DISCOVERY REQUIREMENTS

What Must Be Disclosed

For information defense must disclose to the prosecution, review [step 26](#), above.

When to Disclose

You must provide information:

- a. Within **15** days of informal request ([Pen C §1054.5\(b\)](#)); but
- b. No later than **30** days before trial ([Pen C §1054.7](#)); or
- c. If information received less than **30** days before trial, immediately on receipt. [Pen C §1054.7](#).

NOTE

Under [Pen C §1054.5\(b\)](#), the prosecutor's informal request for discovery triggers the defense duty to disclose. However, you can argue that the defense cannot determine what witnesses, if any, it will call until it knows what witnesses the prosecution intends to call. For discussion (but no resolution) of question of when defense should be able to "reasonably anticipate" what witnesses it will call, see [People v Tillis](#) (1998) 18 C4th 284, 291, 75 CR2d 447; [Hubbard v Superior Court](#) (1997) 66 CA4th 1163, 1167, 78 CR2d 819. See also [In re Littlefield](#) (1993) 5 C4th 122, 136, 19 CR2d 248 (sanctions for failure to disclose witness upheld under circumstances of case).

JUDGE'S PERSPECTIVE

To determine local practice regarding the timing of defense disclosures, contact your local public defender or other defense attorneys and ask how courts and prosecutorial agencies are handling issues involving the timing and sequence of disclosures, including rebuttal witnesses.

RESPONDING TO PEN C §1054.5 REQUEST

IF PROSECUTION DEMANDS DISCLOSURE

If prosecution demands disclosure:

- a. Research the particular legal authority cited by prosecution and cases cited above.
- b. Analyze your evidence and determine whether there are any constitutional or practical reasons why you should not disclose it to prosecution.
- c. Determine local practice. See Judge's Perspective, above.

Before Disclosing

- a. Before you disclose, demand discovery from prosecutor;
- b. If you believe that prosecutor has not provided adequate discovery:
 - (1) Make a formal demand for discovery; and
 - (2) Seek assistance from the court about your obligation to disclose in advance of disclosures by the prosecution; and

- c. If appropriate, consider asking court for protective order under Pen C §1054.7.

When Disclosing

- a. Make disclosure within 15 calendar days after informal demand; or
- b. As soon as you decide to call the witness or use the evidence.

SANCTIONS FOR NONDISCLOSURE

- a. If you present evidence at trial that you have not disclosed before trial, expect judge to grant the prosecution a brief continuance to evaluate the evidence. Pen C §1054.5(b).
- b. If the judge finds that you reasonably should have anticipated presenting the undisclosed evidence before trial, expect an order imposing sanctions. Pen C §1054.5(b).

NOTE

The court may prohibit testimony or other evidence only if other sanctions have been exhausted.

Further Research: On discovery generally, see Crim Law, chap 11.

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STEP 30. OBTAIN EXPERT ASSISTANCE

CONSIDER EMPLOYING EXPERT

You should consider employing a confidential expert to advise you on technical matters, *e.g.*:

- a. In most drunk driving cases, to assess the validity of any tests that were performed;
- b. In cases where medical evidence is contemplated.

CHOOSE APPROPRIATE EXPERT

If you are considering employing an expert, you should consult:

- a. Other attorneys for referrals;
- b. California Expert Witness Directory (1994), California Attorneys for Criminal Justice (CACJ), 1225 8th St., Suite 150, Sacramento, CA 95814, 916-448-8868, <http://www.cacj.org/publications.htm>.

IF CLIENT CANNOT AFFORD EXPERT

If your client is indigent (Evid C §730):

Determine Fees

Contact the expert to determine particular expertise, fees, and availability.

Move for Appointment

If client cannot afford expert's fees, move court to appoint an expert.

PREPARE MOTION AND PROPOSED ORDER

Submit to court a motion and proposed order that (Evid C §§730-731):

Appoints Expert

Appoints an expert in a case that requires expert testimony.

Sets Fees

Fixes the compensation to be paid to the expert by the county in which the case is pending (Evid C §731).

Maintains Confidentiality

Provides that the appointment is "confidential" (*i.e.*, information concerning the expert is not disclosed in court file or to prosecution), *e.g.*:

- a. Any privileged information you provide to the expert, *e.g.*:
 - (1) Information you received from your client;
 - (2) Your theories of the case;
- b. Any billing or other information sent to the court concerning the expert.

Further Research: See Crim Law §§11.10, 11.14, and 18.8-18.12.

NOTE

The statements or reports of the expert become discoverable if you decide to call the expert as a witness at trial. Your client's statements to the expert are not discoverable under Pen C §1054.3 (Rodriguez v Superior Court (1993) 14 CA4th 1260, 1269, 18 CR2d 120), but may become admissible if calling the expert is deemed a waiver of the attorney-client or other privilege. People v Jones (2003) 29 C4th 1229, 1264, 131 CR2d 468 (by placing mental state in issue, defendant waived attorney-client and work-product privilege, and privilege against self-incrimination with respect to statements made to psychiatrist who testified at trial).

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Source: Criminal Law/Defending Your Client in a Misdemeanor Case (Including a DUI) (Action Guide)/At Pretrial Conference/STEP 31. PREPARE TO ATTEND THE PRETRIAL CONFERENCE

At Pretrial Conference

STEP 31. PREPARE TO ATTEND THE PRETRIAL CONFERENCE

PRETRIAL CONFERENCE DEFINED

The pretrial conference is your next court appearance, following the arraignment, in which:

- a. You negotiate to resolve the case short of trial, *i.e.*, reach a "disposition" (see [step 32](#), below); and
- b. If the pretrial negotiations do not result in a disposition, the court will set:
 - (1) Case for trial; or
 - (2) A future date for pretrial motions. See [steps 36-37](#), below, and [Appendix B](#) for pretrial motion resources.

DETERMINE JUDGE'S PROCEDURES

Check with the court clerk for judge's pretrial procedures, because each judge conducts pretrial conferences differently, *e.g.*:

- a. Some judges may conduct conferences "first come, first served," so you may want to arrive early and sign up for the conference;
- b. Some judges literally do not participate in the pretrial conference;
- c. Others are very active, *e.g.*, judge points out weaknesses in both parties' cases to encourage both sides to settle the case.

Example 1: The pretrial conference takes place in chambers, where you, the judge, and prosecutor attempt to resolve the case short of trial. This strategy allows for a reasoned discussion of the strengths and weaknesses of the case, and a good assessment of what case is worth, *e.g.*, possible amount of jail time, fine, likely alternatives to jail.

Example 2: You and the prosecutor meet before the pretrial conference to discuss possible disposition. The judge then calls your case on the record to determine whether you and the prosecutor have resolved the case, or whether the case is to be set for trial.

BE FAMILIAR WITH CASE

By the pretrial conference, you should:

- a. Understand the legal and factual issues in your case that will allow you to effectively negotiate a resolution.

JUDGE'S PERSPECTIVE

Review the complaint to see whether there are multiple counts. Review the statute for *each* count, and determine whether client could be sentenced on each count. See [Pen C §654](#); see also [step 61](#), below.

- a. To bargain effectively, know:
 - (1) Evidence held by prosecutor; and
 - (2) Possible dispositions that would be agreeable to prosecutor.
- b. Investigate possible sentencing alternatives and consequences (see [steps 33-34](#) and [steps 58-62](#), below), so that you are prepared to:
 - (1) Discuss alternatives with the judge, *e.g.*, if your client is eligible for pretrial diversion (see [step 34](#), below); and
 - (2) Explain those alternatives to your client, *e.g.*, what happens if client is diverted (see [step 34](#), below; for discussion of

preparing client for conference, see below).

JUDGE'S PERSPECTIVE

Discuss with your client the possible requirements of any diversion or deferred entry of judgment program and make sure he or she is interested in participating.

CONSIDER PREPLEA REPORT

a. In difficult cases, consider requesting the probation department to prepare a *preplea* report (CCP §131.3) to explore possible dispositions.

b. Before requesting a preplea report, advise your client:

(1) That it may be necessary to discuss the facts of the offense with the probation officer;

(2) That statements the client makes to the probation officer will not be admissible in the prosecution's case in chief if negotiations are unsuccessful and the case goes to trial (see Evid C §1153; *People v Ledesma* (2006) 39 C4th 641, 692, 47 CR3d 326); but

(3) That such statements will be admissible as impeachment if the client testifies inconsistently at a subsequent trial. See *People v Macias* (1997) 16 C4th 739, 66 CR2d 659.

Example: In a child abuse or neglect case in which you believe the defendant might be an appropriate candidate for deferred entry of judgment (see Pen C §§1000.12-1000.17), a favorable evaluation in a preplea report might help you negotiate such a disposition for your client.

CONTENTS OF REPORT

For contents of report, see step 5Z, below.

Further Research: On diversion and deferred entry of judgment, see Crim Law, chap 27.

PREPARE CLIENT FOR CONFERENCE

a. Explain to client the purpose of the conference (see above).

b. Discuss the negotiation process. See step 32, below.

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Source: Criminal Law/Defending Your Client in a Misdemeanor Case (Including a DUI) (Action Guide)/At Pretrial Conference/STEP 32. PREPARE TO NEGOTIATE DISPOSITION OF THE CASE

STEP 32. PREPARE TO NEGOTIATE DISPOSITION OF THE CASE

RECOGNIZE IMPORTANCE OF NEGOTIATING

Negotiating with the judge and prosecutor is an important skill, because approximately 90 percent of all cases settle without trial. On effect of negotiated settlement, see [step 66](#), below.

NOTE

Do not allow the judge to intimidate or speak directly to your client about the negotiations. See *People v Weaver* (2004) 118 CA4th 131, 148, 12 CR3d 742 (judge abused discretion in refusing to allow defendant to withdraw plea and urging him to accept plea).

KNOW WHEN PROSECUTOR'S APPROVAL REQUIRED

a. Prosecutor must initiate referral for deferred entry of judgment in:

- (1) Drug case (see [Pen C §§1000-1000.8](#)); and
- (2) Child abuse or neglect case (see [Pen C §§1000.12-1000.17](#)).

b. If "charge bargaining" is the practice in your county (*e.g.*, in San Francisco), prosecutor *must agree* to any reduction or other change in offense charged. See *People v Orin* (1975) 13 C3d 937, 120 CR 65 (judge may not accept plea to lesser or different charge or dismiss any charge over prosecutor's objection).

KNOW WHEN PROSECUTOR'S APPROVAL NOT REQUIRED

Even if prosecutor refuses to agree to a proposed settlement, you and judge may negotiate:

- a. Civil compromise (see below and [step 35](#), below);
- b. Diversion in eligible cases;
- c. Length and type of sentence; and
- d. Whether client will be granted probation (see [step 33](#), below).

Civil Compromise

If appropriate to your case, negotiate to resolve the case by civil compromise, *i.e.*, victim agrees to drop the charges in exchange for satisfaction for the damage defendant caused during the crime. See [step 35](#), below.

Diversion

If client is eligible for diversion (see [Pen C §§1000.5](#) (drug diversion), [1001-1001.75](#) (misdemeanor diversion); [step 34](#), below), negotiate to divert the client to a program that:

- a. Suspends criminal proceedings *before* entry of plea;
- b. Refers defendant for:
 - (1) Education;
 - (2) Treatment; or
 - (3) Rehabilitation; and
- c. Results in client having a clean record for most purposes if defendant successfully completes the program.

Deferred Entry of Judgment

If client is ineligible for diversion or if there is no local preplea diversion program, negotiate for deferred entry of judgment program (see [Pen C §§1000-1000.8](#)) that:

- a. Suspends criminal proceedings *after* entry of guilty plea;
- b. Refers defendant for:
 - (1) Education;
 - (2) Treatment; or
 - (3) Rehabilitation; and
- c. Results in client having a clean record for most purposes if defendant successfully completes the program.

JUDGE'S PERSPECTIVE

Find out from local attorneys what types of diversion or deferred entry of judgment programs are available. Become familiar with the local programs because they vary in content and some judges have their own requirements. See [step 34](#), below.

You will be more effective in your negotiations if you are prepared to tell the judge:

- a. What client is willing to do; and
- b. All client's personal factors that show why client would benefit and succeed on diversion or deferred entry of judgment.

Probation

Judge may agree to give defendant probation by either ([Pen C §1203](#)):

- a. Suspending imposition of *any* sentence (ISS); or
- b. Ordering a fixed county jail sentence and suspending it (*e.g.*, 6 months county jail suspended). For further requirements of probation, see [step 33](#), below; see also [Crim Law, chap 38](#).

DISCUSS NEGOTIATION STRATEGY WITH CLIENT

- a. Present client with possible sentences, alternatives, and consequences (see [steps 33-35](#) and [steps 56-62](#), below).
- b. Make sure client is prepared to accept a reasonable disposition, *e.g.*, do not promise client you will go to trial if you believe client should agree to diversion if offered by court and prosecution.
- c. Explain how you will negotiate to reach the desired disposition.

ADAPT YOUR NEGOTIATING STYLE TO FIT THE CASE

The style of negotiation depends on:

- a. Your personality;
- b. Strengths or weaknesses of your case;
- c. Prosecutor's personality; and
- d. Judge's policies.

Example 1: Prosecutor asks for maximum term of 180 days in jail for a battery case with no indication of a lesser sentence, although he or she might be willing to negotiate if you ask. The prosecutor wants to try to squeeze more out of you than the case is "worth." If you counter with 60 days in jail and 3 years probation, the counteroffer will probably be accepted.

Example 2: In San Francisco, unlike some other counties, the policy is that you can bargain on both the charges and the sentence, *i.e.*, bargain for both a particular disposition and a particular charge, which may or may not be listed in the complaint. For

instance, if the client is charged with battery and the prosecutor asks for 180 days in jail, you could counter with 60 days in jail on a disturbing the peace charge.

DECIDE WHAT TO REVEAL

Be careful about revealing your defense during negotiations unless it is obvious, because once you have revealed an issue, you cannot hide it again, *e.g.*:

- a. Sometimes you might want to say just enough to arouse some sympathy for your client;
- b. If you reveal a witness's name, the prosecutor will certainly interview the person.

PUT OUTCOME OF NEGOTIATION ON THE RECORD

After the pretrial negotiation, there will be a brief court appearance when:

- a. Court will call the case; and
- b. You will take whatever action you and your client deem appropriate, *e.g.*, generally, your client can:
 - (1) Accept the offer and plead guilty;
 - (2) Reject the offer and have judge set the case for jury trial; or
 - (3) Reject the offer and have judge set the case for pretrial motions, *e.g.*, motion to suppress evidence. See [step 36](#), below.

CONTINUE NEGOTIATING THROUGHOUT CASE

Remember that you may offer or accept a disposition at almost any stage in the process, particularly when a factor changes, *e.g.*, new investigation, new prosecutor, new judge, or a motion to suppress evidence granted.

JUDGE'S PERSPECTIVE

In some jurisdictions, a prosecutor's offer to your client may expire at a certain point, *e.g.*, the offer may only be open at the arraignment or only through pretrial.

If the prosecution agrees to hold an offer open for a time period to let your client decide:

- a. Put it on the record, if the court allows you to do so, and if the prosecutor agrees; or
- b. If you cannot put the offer on the record, ask the prosecutor to make a note in his or her file, in case a different prosecutor later handles the file.

Further Research: On pleas and settlement generally, see [Crim Law, chap 26](#).

Source: Criminal Law/Defending Your Client in a Misdemeanor Case (Including a DUI) (Action Guide)/At Pretrial Conference/STEP 33. CONSIDER PROBATION OR CONDITIONAL SENTENCE IN DISPOSITION OF THE CASE

STEP 33. CONSIDER PROBATION OR CONDITIONAL SENTENCE IN DISPOSITION OF THE CASE

UNDERSTAND terminology

PROBATION AND CONDITIONAL SENTENCE DISTINGUISHED

Penal Code §1203(a) provides:

a. "Probation":

- (1) Suspension of the imposition or execution of a sentence; and
- (2) Order of conditional and revocable release of defendant under supervision of the probation officer.

b. "Conditional sentence":

- (1) Suspension of the imposition or execution of a sentence; and
- (2) Order of revocable release of defendant subject to conditions imposed by the court *without* supervision of the probation officer.

Both of these sentencing options are available whenever probation is authorized in any code as a sentencing option for misdemeanors. See Pen C §1203(a).

JUDGE'S PERSPECTIVE

Become familiar with the definitions of terminology used by attorneys and judges in your jurisdiction. The conditional release of a defendant without probation department supervision is often referred to as "summary probation." The correct statutory term is "conditional sentence."

SUSPENDED SENTENCE

When granting probation or conditional sentence, judge releases defendant and suspends all or part of a county jail sentence by either (Pen C §1203(a)):

- a. Suspending imposition of any sentence (ISS); or
- b. Ordering a fixed county jail sentence and suspending it (*e.g.*, 6 months county jail suspended).

understand probation

MAXIMUM PROBATION PERIOD

Judge may release a defendant on *maximum* probation period of:

- a. 3 years for most misdemeanors (Pen C §1203a); or
- b. 5 years for most drunk driving offenses. See Veh C §23600.

NOTE

The defendant can implicitly waive these maximum terms by agreeing to a probation period beyond the statutory maximum term.

JUDGE'S PERSPECTIVE

Recognize that your client may not be immediately released, *i.e.*, the judge may include as a condition of probation that your client spend time in the county jail.

REQUIREMENTS FOR PROBATION

Defendant Must Agree to Terms

To obtain probation, defendant must promise to abide by certain conditions, *e.g.*:

- a. Suspended sentence;
- b. Supervision by the county probation department (Pen C §1202.8);
- c. Other conditions that the court determines are fitting and proper in the case (Pen C §1203.1), *e.g.*, to:
 - (1) Be law abiding;
 - (2) Serve a lesser amount of time in jail;
 - (3) Go to counseling;
 - (4) Be subject to a warrantless search;
 - (5) Pay a fine; or
 - (6) Pay restitution. Pen C §§1202.4 and 1203.1(a)(3); see step 59, below.

For discussion of invalid probation conditions, see below.

NOTE

If client is convicted, whether by plea or trial, and is granted probation, restitution will be a mandatory condition of probation and is enforceable as a civil judgment. See Pen C §§1202.4, 1203.04, and 1203.1(a)(3).

Judge Must Agree

Judge determines that probation should be granted based on the following factors (see Pen C §1202.7; see also step 57, below):

- a. Whether the safety of the public can be ensured, if necessary, through conditions of probation;
- b. Nature of offense, *e.g.*, judge will be more likely to grant probation for a nonviolent offense;
- c. Whether judge can satisfy the interests of justice by:
 - (1) Giving defendant some alternative form of punishment;
 - (2) Reintegrating defendant into the community; and
 - (3) Imposing conditions of probation (for when probation condition invalid, see below);
- d. Loss to the victim, *e.g.*, judge will be more likely to grant probation if the victim's loss is minimal; and
- e. Needs of the defendant, *e.g.*, defendant will be able to support family if on probation.

WHEN PROBATION CONDITION INVALID

A condition of probation is invalid when it (*People v Lent* (1975) 15 C3d 481, 124 CR 905):

- a. Has no relationship to the crime;
- b. Relates to conduct that is not criminal;
- c. Forbids conduct that is not reasonably related to future criminal offenses; or
- d. Does not serve the statutory purposes of probation.

Example 1: Search condition was invalid because crime of conviction (gambling) did not involve contraband. People v Mayers (1980) 110 CA3d 809, 816, 168 CR 252.

Example 2: Probation condition ordering forfeiture of defendant's truck unreasonable because (1) express purpose of forfeiture, punishment, was at odds with statutory purpose of rehabilitation, and (2) defendant's lawful ownership of truck was neither criminal nor reasonably related to future criminality. People v Fritchey (1992) 2 CA4th 829, 3 CR2d 585.

Example 3: Probation condition prohibiting defendant from associating with users and sellers of narcotics, felons, and ex-felons was vague and overbroad. People v Garcia (1993) 19 CA4th 97, 23 CR2d 340. See also In re Kacy S. (1998) 68 CA4th 704, 712, 80 CR2d 432 (probation condition that minor "not associate with any persons not approved by his probation officer" was vague and overbroad). But see In re Frank V. (1991) 233 CA3d 1232, 1241, 285 CR16 (similar condition upheld).

NOTE

A defendant can waive a constitutional right and agree to an otherwise unconstitutional condition of probation as part of a plea bargain. People v Bravo (1987) 43 C3d 600, 607, 238 CR 282.

WHEN PROBATION MAY BE REVOKED

JUDGE MAY REVOKE PROBATION

If defendant does not comply with all conditions of probation, judge may revoke the probation (Pen C §§1203.2(c), 1203.3(a)), *e.g.*:

If Judge Suspended Imposition of Sentence

If judge ordered probation by ISS (for definition, see step 32, above), judge may hand down sentence of any number of days up to the maximum allowed by law when revoking probation.

If Suspended Fixed Sentence

If judge ordered probation by suspending a fixed jail sentence, judge may revoke probation by:

- a. Imposing the full (and usually maximum) sentence; or
- b. Modifying the probationary sentence to include *additional* time in jail while not ordering the full fixed term in jail.

When Revocation Meaningless

Judge *cannot* remand the client to jail when the defendant fails to comply with the conditions of probation, *if* at the time court conducts hearing on the probation violations defendant has served either (Pen C §1203.1):

- a. Maximum period of custody allowed by law; or
- b. Full period of suspended incarceration ordered as a condition of probation, *e.g.*, suspended sentence of 6 months in the county jail when defendant served 6 months before and during trial.

WHEN CLIENT DISPUTES WHAT PROBATION OFFICER SAYS

You should:

- a. Use a subpoena duces tecum to subpoena the probation file.
- b. Be prepared to litigate the violation at the revocation hearing.
- c. Be aware that failure to review the probation file can be the basis for a finding of ineffective assistance of counsel. People v Gayton (2006) 137 CA4th 96, 40 CR3d 40.

CONSIDER PROBATION IN YOUR CASE

DISCUSS WITH CLIENT

- a. Explain to client possible alternatives to probation and consequences of probation violation. See Crim Law §38.35.
- b. Make sure client is prepared to accept reasonable conditions of probation, *e.g.*, do not promise client there will be *no* jail time, when it is more likely that client will receive minimum jail time with the rest of the sentence suspended.

CONSIDER WHETHER DEFENDANT WANTS PROBATION

Defendant has the right to refuse probation and serve the straight time in jail (see People v Byers (1979) 90 CA3d 140, 152, 153 CR 249), *e.g.*, defendant may prefer to serve the full period of incarceration and avoid the conditions of probation.

Further Research: On probation generally, see Crim Law, chap 38; on probation revocation, see Crim Law, chap 46.

UNDERSTAND PROPOSITION 36 PROBATION

NOTE

During the 2006 regular session, the California legislature amended the Proposition 36 probation provisions in Pen C §1210.1. See Stats 2006, ch 63, §7. Among other things, the amended provisions permit incarceration of offenders placed on Proposition 36 probation who relapse during treatment. See Stats 2006, ch 63, §7(e). As of the time of publication, a preliminary injunction issued on September 14, 2006, is blocking the legislation from taking effect in California while the court considers a constitutional challenge. The case, *Gardner v Schwarzenegger* (Alameda Super Ct, No. RG06278911), may be tracked by entering case number RG06278911 on the Case Summary page under "DomainWeb" at <http://www.alameda.courts.ca.gov/courts/>. More court documents are available at the website of one of the plaintiffs: <http://www.drugpolicy.org/law/treatmentvsi/#decisions>.

Citations to Pen C §1210.1 in this Action Guide are to the former version of the section, which will remain in effect until the injunction is dissolved.

MANDATORY PROBATION FOR QUALIFYING DRUG OFFENDERS

Unless an exception applies, if your client is convicted of a nonviolent drug possession offense, the court **MUST** (Pen C §1210.1(a)):

- a. Suspend imposition of sentence;
- b. Grant probation; and
- c. Require your client to participate in an appropriate drug treatment program.

EXCEPTIONS

Proposition 36 probation is not available if the defendant (Pen C §1210.1(b)):

- a. Has been convicted of one or more serious or violent felonies (see Pen C §§667.5(c), 1192.7(c)), unless for five years before the commission of the nonviolent drug possession offense the defendant:
 - (1) Has remained free of prison custody;
 - (2) Has not been convicted of a felony other than a nonviolent drug possession offense; and
 - (3) Has not been convicted of a misdemeanor involving physical injury or the threat of physical injury.
- b. In the proceeding that resulted in the conviction of a nonviolent drug possession offense, has also been convicted of:
 - (1) A nondrug-related misdemeanor; or
 - (2) Any felony.
- c. While using a firearm, unlawfully possesses or is under the influence of:

- (1) Cocaine or cocaine base;
 - (2) Heroin;
 - (3) Methamphetamine; or
 - (4) Phencyclidine (PCP).
- d. Refuses drug treatment as a condition of probation.
- e. Is found by the court by clear and convincing evidence to be unamenable to all forms of available drug treatment, and:
- (1) Has two (or more) separate convictions for nonviolent drug possession offenses; and
 - (2) Has participated in two or more separate courses of drug treatment under Proposition 36.

JUDGE'S PERSPECTIVE

A court has discretion under Pen C §1385 to dismiss, in an appropriate case, a felony count or a "misdemeanor count unrelated to the use of drugs" that would disqualify your client for Proposition 36 sentencing. People v Orbuena (2004) 116 CA4th 84, 90, 10 CR3d 99. Compare In re Varnell (2003) 30 C4th 1132, 1136, 135 CR2d 619.

NOTE

Driving under the influence is *not* a nonviolent drug possession offense. People v Canty (2004) 32 C4th 1266, 14 CR3d 1.

Further Research: For discussion of Proposition 36 probation, see Crim Law §38.3A.

PROBATION REVOCATION UNDER PROPOSITION 36

Proposition 36 probation can be revoked only if the defendant (Pen C §1210.1(e)):

- a. Commits an offense that is not a nonviolent drug possession offense;
- b. Violates a nondrug-related probation condition;
- c. Commits a first drug-related violation of probation by either:
 - (1) Committing one of the nonviolent drug-related offenses described in Pen C §1210.1(e)(3)(A);
 - (2) Violating a drug-related probation condition;

AND

- (3) It is proved by a preponderance of the evidence that the defendant is a danger to others;
- d. Commits a second drug-related violation of probation by either:
 - (1) Committing one of the nonviolent drug-related offenses described in Pen C §1210.1(e)(3)(E); or
 - (2) Violating a drug-related probation condition;

AND

- (3) It is proved by a preponderance of the evidence that the defendant:
 - (a) Is a danger to others; *or*
 - (b) Is not amenable to drug treatment; or
- e. Commits a third drug-related violation of probation by:
 - (1) Committing a nonviolent drug possession offense; or
 - (2) Violating a drug-related condition of probation.

NOTE

Even after terminating Proposition 36 probation, the court retains the power to grant probation and order the defendant to participate in a drug program.

JUDGE'S PERSPECTIVE

If your client completes an appropriate drug treatment program, your client should petition the sentencing court to dismiss the charge and to expunge the conviction. Pen C §1210.1(d)(1).

Remember:

- a. Dismissal of the cases authorizes your client to state that he or she has not been arrested for this case (with some limitations (see Pen C §1210.1(e)(3)); BUT
- b. Your client will *not* be allowed to possess a concealable firearm (Pen C §1210.1(e)(2)).

Further Research: For discussion of revocation of Proposition 36 probation, see Crim Law §§46.36-46.40.

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Source: Criminal Law/Defending Your Client in a Misdemeanor Case (Including a DUI) (Action Guide)/At Pretrial Conference/STEP 34. CONSIDER DIVERSION OR DEFERRED ENTRY OF JUDGMENT PROGRAM AS METHOD OF AVOIDING CRIMINAL RECORD

STEP 34. CONSIDER DIVERSION OR DEFERRED ENTRY OF JUDGMENT PROGRAM AS METHOD OF AVOIDING CRIMINAL RECORD

DIVERSION AND DEFERRED ENTRY OF JUDGMENT DEFINED

Diversion and deferred entry of judgment programs:

- a. Suspend criminal proceedings;
- b. Refer defendant for a program of:
 - (1) Education;
 - (2) Treatment; or
 - (3) Rehabilitation; and
- c. If successfully completed, result in:
 - (1) Court dismissing the case; and
 - (2) Client having a clean record.

JUDGE'S PERSPECTIVE

Programs vary in content and requirements, depending on the locale and the specific judge, so contact the court and local agencies to determine whether there are any special programs or requirements.

Discuss the details of the possible diversion or deferred entry of judgment program with your client to determine whether he or she is interested in participating.

Defendants have mistakenly believed their cases were dismissed when they were placed on diversion or deferred entry of judgment and consequently did not follow through satisfactorily on the program. Emphasize to your client that many judges will not give client a second chance. If the judge terminates diversion, the criminal proceedings will be reinstated. If the judge terminates your client's participation in a deferred entry of judgment program, judgment will be entered on your client's guilty plea.

Further Research: See Pen C §§1000-1000.8 (deferred entry of judgment for drug-related offenses), 1000.12-1000.17 (deferred entry of judgment in child abuse and neglect cases), and 1001-1001.75 (misdemeanor diversion). For further discussion, see Crim Law, chap 27.

DIVERSION AND DEFERRED ENTRY OF JUDGMENT DISTINGUISHED

Misdemeanor Diversion

In *misdemeanor* preplea diversion under Pen C §§1001-1001.75:

- a. Criminal proceedings are suspended before defendant enters plea;
- b. Judge can order diversion under Pen C §§1001-1001.75 even if prosecutor objects (Pen C §1001.3(b)); and
- c. If program is unsuccessful, proceedings are reinstated where they left off.

NOTE

Misdemeanor preplea diversion under Pen C §§1001-1001.75 is not available for drug offenses.

Deferred Entry of Judgment

In deferred entry of judgment:

- a. Prosecutor must initiate proceedings (Pen C §1000(b));
- b. Defendant must plead guilty; and
- c. If program is unsuccessful, trial court must:
 - (1) Enter finding of guilt;
 - (2) Enter judgment; and
 - (3) Set case for sentencing hearing.

JUDGE'S PERSPECTIVE

Be aware that only the prosecutor can initiate a referral for deferred entry of judgment. See Pen C §1000.12(a)-(b). The trial court may not defer entry of judgment and offer services to a defendant if the prosecutor has not found the defendant eligible for the program. People v Wright (2002) 99 CA4th 201, 121 CR2d 419. Compare Sledge v Superior Court (1974) 11 C3d 70, 113 CR 28 (determination of *eligibility* for drug diversion not judicial act and therefore may be entrusted to prosecutor), with People v Superior Court (On Tai Ho) (1974) 11 C3d 59, 113 CR 21 (trial court's *decision to divert* eligible defendant is judicial decision, not subject to prosecutor's veto).

Therefore, if your client appears to be eligible for this program, contact the prosecuting agency *as soon as possible*.

Drug Offense Diversion

In *drug offense* preplea diversion under Pen C §1000.5:

- a. County must have established drug court program;
- b. Defendant must meet criteria of program; and
- c. Local program sets consequences for failure to meet program objectives.

WHEN AVAILABLE

Diversion or deferred entry of judgment is available when all of the following are satisfied:

Statute Provides

Offense is eligible.

Program Available

County where case is pending has program.

Defendant Eligible

Defendant meets the eligibility requirements of both the:

- a. Statute; and
- b. Local program.

Court Orders

Court determines that defendant would benefit from diversion.

Defendant Waives Speedy Trial

Defendant waives the right to a speedy trial.

Further Research: For rules applicable to misdemeanor diversion in general, discussed below, see Pen C §§1001-1001.9. For diversion of developmentally disabled defendants, discussed below, see Pen C §§1001.20-1001.34. For diversion of individuals charged with writing bad checks, see Pen C §§1001.60-1001.67. For diversion of parents charged with contributing to the delinquency of their own children, see Pen C §§1001.70-1001.75.

WHEN UNAVAILABLE

Neither misdemeanor diversion nor deferred entry of judgment is available to a defendant charged with violations of Veh C §§23152 and 23153 (drunk driving). Pen C §§1000(a), 1001.2; Veh C §23640.

BANK EMPLOYEE MAY LOSE JOB

If client works for a financial institution, merely entering a diversion program may result in client's termination under Federal Deposit Insurance Corporation (FDIC) statute. See 12 USC §1829.

NOTE

Recognize that this FDIC rule appears to assume that the client admitted guilt before entry into the diversion program. This is true for drug and child abuse offenses eligible for deferred entry of judgment, but *not* for misdemeanors eligible for diversion under Pen C §§1001-1001.75. See Pen C §1001.3.

PRETRIAL MISDEMEANOR DIVERSION

WHEN AVAILABLE

a. Diversion may be available for any offense that has been charged as a misdemeanor, either temporarily or permanently, at any point in the trial proceedings (Pen C §1001.1), if:

(1) The defendant has a minimal prior record; and

(2) Local policy permits diversion for the offense in question (Pen C §1001.2(b); see *Davis v Municipal Court* (1988) 46 C3d 64, 75, 249 CR 300).

b. Misdemeanor diversion may also be available under Pen C §§1001.50-1001.55, but only in a county that adopts the provisions of Pen C §§1001.50-1001.55, by local ordinance.

DETERMINE LOCAL REQUIREMENTS

Check with clerk of the court in the county where case is pending to determine:

a. Whether diversion program exists; and

b. Any special rules for eligibility.

DIVERSION FOR defendants with cognitive developmental disabilities

WHEN AVAILABLE

a. The term "cognitive developmental disability" includes (Pen C §1001.20(a)):

(1) Mental retardation;

(2) Autism; and

(3) Closely related disabilities that require similar treatment.

b. Diversion may be available when defendant (Pen C §1001.21):

(1) Is determined by a regional center to be:

(a) Mentally retarded; OR

(b) To have another cognitive developmental disability if defendant was a client of the regional center at the time of the offense;
AND

(2) Has not been diverted in previous 2 years.

NOTE

For discussion of mental health issues when client is not developmentally disabled, see [step 18](#), above.

REVIEW STATUTORY REQUIREMENTS

Review [Pen C §§1001.20-1001.34](#) for specific requirements for developmentally disabled defendant diversion program.

JUDGE'S PERSPECTIVE

Recognize that your client will have to consent to the diversion and waive his or her right to a speedy trial. [Pen C §1001.22](#).

REVIEW WHEN DIVERSION CAN BE TERMINATED

If defendant is not meeting progress requirements of the diversion program ([Pen C §1001.29](#)), the judge may hold a hearing to:

- a. Modify the diversion order; or
- b. Reinstigate criminal proceedings.

CHECK LOCAL REQUIREMENTS

Each county administers this program differently. Check local practice.

DETERMINE BEST OPTION FOR CLIENT

Trial

When your client does not have the mental capacity to form the specific or general intent required by law, he or she is not guilty of the crime, and you may want to proceed to trial and seek an acquittal.

Diversion

On the other hand, evaluate whether your client would be best dealt with *outside* the criminal justice system in a diversion program.

JUDGE'S PERSPECTIVE

When considering the best option for your client, recognize that the stress of being in court, combined with the complexity of the language used there, may confuse a mentally impaired client to the extent that he or she is unable to consent to the diversion program and waive time for trial. See [Pen C §1001.22](#).

If you and the client decide to seek diversion, carefully prepare your client before appearing in court. Explain that he or she may have to answer questions in court.

If your client has difficulty answering the court's questions about the diversion program and speedy trial, you may want to:

- a. Ask to approach the bench;
- b. Ask the judge to allow you to explain and ask your client these questions on the record; and
- c. Gear your questions to your client's level of understanding.

Further Research: See [Crim Law, chap 27](#).

BE FAMILIAR WITH ALTERNATIVES TO CONVICTION

Know When Deferred Entry of Judgment Available

Deferred entry of judgment may be available when:

- a. Defendant is charged with one of the crimes listed in Pen C §1000(a);
- b. Defendant does *not* have (Pen C §1000(a)(1)-(6)):
 - (1) Prior drug conviction;
 - (2) Prior drug diversion or deferred entry of judgment within 5 years;
 - (3) A felony conviction within 5 years; or
 - (4) Prior revoked probation or parole that has never been completed;
- c. There is no *evidence* that defendant violated a narcotics or dangerous drug statute that is not listed in Pen C §1000(a);
- d. The offense does not involve violence or threatened violence; and
- e. The offense does not involve possession for sale or sale of drugs.

JUDGE'S PERSPECTIVE

Look at *all* of the charges against your client to determine eligibility.

Example: Defendant is charged with violating Veh C §23152(a) (driving under the influence of a controlled substance) *and* Health & S C §11550 (being under the influence of a controlled substance). Defendant is not eligible for deferred entry of judgment because the Vehicle Code violation is not one of the offenses listed in Pen C §1000(a). See People v Duncan (1990) 216 CA3d 1621, 265 CR 612 (decided before amendments to Pen C §1000 that eliminated preplea diversion for drug offenders in counties without a drug court program).

Know Whether Preplea Diversion Available

- a. Preplea diversion may be available when (Pen C §1000.5(a)):
 - (1) The superior court, the district attorney, and the public defender have agreed in writing to implement a drug court program; and
 - (2) The defendant meets the criteria established by the drug court program.
- b. The drug court program must include (Pen C §1000.5(a)):
 - (1) Graduated sanctions and rewards;
 - (2) Individual and group therapy;
 - (3) Drug testing;
 - (4) Close monitoring of progress; and
 - (5) Educational or vocational counseling.
- c. The drug court program may include other requirements.

Avoids Adverse Immigration Consequences

If the client has immigration concerns, conviction of any drug offense could be disastrous. See step 17, above, and Appendix E. Because deferred entry of judgment counts as a conviction for immigration purposes (see Murillo-Espinoza v INS (9th Cir 2001)

261 F3d 771; 8 USC §1101(a)(48)(A)), preplea diversion, if available, may be the client's only way to avoid adverse immigration consequences. See Crim Law §§52.3, 52.14, 52.29.

RECOGNIZE IMPORTANCE OF ALTERNATIVES TO CONVICTION

Avoids Criminal Record

If your client is charged with a misdemeanor drug offense, *consider* diversion (if available in your county) or deferred entry of judgment so that client can avoid having a *criminal record*.

NOTE

One of the consequences of a drug conviction is lifelong ineligibility for diversion or deferred entry of judgment related to a drug offense. Your client may think it is easier to plead guilty to possession of marijuana (Health & S C §11357(b)) and pay a \$100 fine than to participate in a drug program that requires attendance at a drug abuse clinic, BUT if the client is ever arrested for another drug-related crime, he or she will be ineligible for diversion or deferred entry of judgment.

REVIEW REQUIREMENTS

- a. Review Pen C §§1000-1000.5.
- b. Determine whether:
 - (1) Drug court program available; and
 - (2) Client meets preplea diversion eligibility requirements.
- c. Be aware that if client must plead guilty before participating in a program (because drug court unavailable in county or client ineligible), you must evaluate and litigate all legal issues before the guilty plea is entered, *e.g.*, a motion to suppress or speedy trial motion.

REVIEW LOCAL PROVISIONS

Check with local attorneys or clerk of the court in the county where case is pending to determine any special local program provisions, *e.g.*:

- a. Amount of fees;
- b. Length of program;
- c. Details about who and where program administered, *e.g.*, probation department, sheriff's department.

REVIEW CONSEQUENCES OF FAILURE TO MEET PROGRAM REQUIREMENTS

Preplea Drug Diversion

Be familiar with local drug court program's graduated schedule of sanctions and rewards.

NOTE

Often, the drug court program starts with diversion, proceeds to deferred entry of judgment, and subsequently to Proposition 36 probation with gradually increasing restrictions.

Deferred Entry of Judgment

- a. Proceedings for entry of judgment can be instituted by:
 - (1) Prosecution;
 - (2) Probation officer; or
 - (3) Court, on its own motion.
- b. After notice and hearing, court can enter judgment on plea when client:

- (1) Performs unsatisfactorily in program;
- (2) Is not benefiting from education, treatment, or rehabilitation; or
- (3) Is convicted of:
 - (a) A felony; or
 - (b) A misdemeanor that involves client's propensity for violence; or
- (4) Has engaged in criminal conduct rendering client unsuitable for further participation in program.

Advise Client of Consequences of Failure to Meet Program Goals

Before client enters guilty plea, be sure to advise client of pitfalls of entering into a deferred entry of judgment disposition.

Deferred Entry of judgment in Child Abuse And Neglect Cases

WHEN AVAILABLE

Prosecutor may refer defendant for deferred entry of judgment and counseling in lieu of final conviction. Pen C §1000.12.

NOT AVAILABLE IN SEXUAL ABUSE CASES

Deferred entry of judgment is not available to a defendant charged with sexual molestation or sexual abuse of a child. Pen C §1000.12(c).

NOTE

A defendant charged with a misdemeanor sex offense against a child may be eligible for probation under Pen C §1203.066(d). If the child was under age 14 at the time of the offense, the court may not suspend sentence unless it obtains a report on the defendant's mental condition from a psychiatrist or psychologist. See Pen C §288.1.

DETERMINE LOCAL PROVISIONS

Check with clerk of the court in the county where case is pending to determine any special provisions, *e.g.*:

- a. Amount of fees;
- b. Length of program;
- c. Details about how and where program is administered.

Source: Criminal Law/Defending Your Client in a Misdemeanor Case (Including a DUI) (Action Guide)/At Pretrial Conference/STEP 35. CONSIDER CIVIL COMPROMISE AS METHOD OF RESOLVING CASE

STEP 35. CONSIDER CIVIL COMPROMISE AS METHOD OF RESOLVING CASE

WHEN APPROPRIATE

Civil compromise is appropriate when (Pen C §§1377-1379):

- a. Offense involves damage for which the victim has a civil remedy; AND
- b. Victim agrees to drop the charges in exchange for satisfaction for the damage.

Example: Defendant throws ball at driver's car window and window breaks. Defendant is arrested for vandalism. Driver could also sue defendant for damage to her car. Driver agrees to drop the criminal charges and not file a civil action if defendant pays for the damage.

STATUTORY REQUIREMENTS

You *cannot* settle the case by civil compromise if defendant committed crime (Pen C §1377), *e.g.*:

- a. Against an officer of justice executing duties;
- b. Riotously;
- c. In a way that violates court order under Pen C §273.6 or §273.65;
- d. With felonious intent (Pen C §1377(c)), *e.g.*, you may have difficulty civilly compromising a "wobbler" (*i.e.*, offense that can be charged as either a misdemeanor or a felony), if prosecutor argues this limitation;
- e. Against any family or household member, or persons described in Fam C §6211 or Pen C §13700(b);
- f. Upon an elder in violation of Pen C §368 or Welf & I C §15656;
- g. Upon a child described in Pen C §647.6 or §11165.6.

HAVE VICTIM ACKNOWLEDGE CIVIL COMPROMISE

Victim must appear before the court and acknowledge that satisfaction has been received for the injury. Pen C §1378.

Check Local Practice

While statute seems to require the personal presence of the victim in court, some judges will allow victim to appear by declaration under penalty of perjury.

ASK COURT TO DISCHARGE

Ask court to stay all proceedings and discharge defendant when (see Pen C §1378):

- a. Statutory requirements are met (Pen C §1377); and
- b. Case law limitations are met (see, *e.g.*, People v McWhinney (1988) 206 CA3d Supp 8, 254 CR 205 (violation of Veh C §20002, hit and run, may not be civilly compromised)).

JUDGE'S PERSPECTIVE

Recognize that the court has *discretion to*:

- a. Stay the prosecution; and
- b. Discharge the defendant when the conditions of the compromise have been met.

The court may also require your client to pay court costs. See Pen C §1378.

NO NEED FOR PROSECUTOR APPROVAL

Court may approve civil compromise, even if prosecutor objects, *if* your case falls squarely within the statute and the applicable case law. See Crim Law §25.5.

SET FORTH REASONS FOR DISCHARGE

If court discharges the case, court order must set forth *reasons* for discharge in the order. Pen C §1378.

EFFECT OF DISCHARGE

Defendant cannot be prosecuted for the same offense. Pen C §1378.

Further Research: See Crim Law §26.5.

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When Making Pretrial Motions

STEP 36. CONSIDER PRETRIAL MOTIONS

PRETRIAL MOTIONS GENERALLY

REVIEW FACTS OF CASE

Following the arraignment (see [step 12](#), above), review:

- a. Discovery prosecutor has provided; plus
- b. Information client has provided.

WHEN TO BRING PRETRIAL MOTION

Use pretrial motion:

- a. To have case dismissed or gain other advantage for your client, *e.g.*, by suppressing a statement or other evidence;
- b. To gain opportunity to see, hear, and cross-examine witnesses, *e.g.*, when prosecution presents witnesses to oppose your motion to suppress evidence;
- c. As another opportunity to resolve the case; and/or
- d. To litigate specific legal issues. For discussion of specific pretrial motions, see below; see also [Appendixes A-C](#) and [Crim Law §18.4](#).

KNOW DIFFERENCE BETWEEN PRETRIAL AND TRIAL MOTIONS

Be aware that the term "pretrial motion" is often used loosely to refer to:

- a. Pretrial motions, *i.e.*, motions that must ordinarily be brought before trial, such as:
 - (1) Discovery motions;
 - (2) Motions to suppress evidence under [Pen C §1538.5](#); and
 - (3) Motions to disclose identity of informant; AND
- b. Trial motions, *i.e.*, motions that may only be finally decided at trial, but that for convenience are made before trial, such as most motions concerning admissibility of evidence.

JUDGE'S PERSPECTIVE

Motions brought at the outset of trial, before or after the jury is sworn, or during trial are often called motions in limine. See [People v Morris](#) (1991) 53 C3d 152, 188, 279 CR 720, disapproved on other grounds in [People v Stansbury](#) (1995) 9 C4th 824, 830 n1, 38 CR2d 394.

Further Research: On pretrial motions generally, see [Crim Law, chap 18](#). On trial motions generally, see [Crim Law, chap 31](#).

RECOGNIZE EFFECT OF JEOPARDY

Remember that once the jury is sworn, "jeopardy" attaches (*i.e.*, defendant is in jeopardy of being convicted) (see US Const amend V):

- a. Defendant can be put in jeopardy only *once*; and
- b. If a motion is lost by the prosecution *after* jeopardy attaches, prosecutor can appeal only certain orders. See [Pen C §§1238, 1466](#).

HOW PRETRIAL AND TRIAL MOTIONS DIFFER

How Challenged

To appeal order following:

- a. *Pretrial motion*: Bring writ petition, *e.g.*, mandamus, prohibition, before trial.

NOTE

See Appeals and Writs in Criminal Cases, chaps 7-8 (3d ed Cal CEB 2007), referred to throughout this Action Guide as Appeals & Writs, to determine the correct type of writ to request for your client, and when and how to proceed.

- b. *Trial motion* (even if made before trial):

- (1) Challenge ruling on postconviction appeal; or
- (2) Ask trial judge to reconsider.

When Final

Finality of orders:

- a. *Pretrial motion*: Order usually considered final when made, *i.e.*:

- (1) May be challenged immediately in a higher court; but
- (2) May *not* be reconsidered by trial court.

- b. *Trial motion* (even if made before trial): Trial judge may reconsider at any point during trial, unless you stipulate to the contrary. See *Saidi-Tabatabai v Superior Court* (1967) 253 CA2d 257, 266, 61 CR 510.

Further Research: See generally Crim Law, chaps 18, 31, 42-43; see also Appeals & Writs, chaps 7-8.

JUDGE'S PERSPECTIVE

Check the statute and case law for your specific motion to determine:

- a. When order is final;
- b. What type of appellate review is available; and
- c. What showing your client has to make on appeal, based on what presumptions and burdens apply.

Consider whether to request a stay of trial.

IN LIMINE RULING NOT BINDING ABSENT STIPULATION

- a. The trial court's rulings on in limine evidentiary motions are usually not binding on the court and may be revisited during trial.
- b. If you and the prosecutor stipulate, and if the trial judge agrees, pretrial rulings on trial and in limine motions can be binding. *In re Anthony H.* (1983) 148 CA3d 1123, 196 CR 448.

Recognize Effect of Stipulation

Your stipulation that rulings are binding:

- a. Prevents you or the prosecutor from rearguing the motion during the trial;
- b. Enables the parties to challenge the ruling on appeal after judgment without renewing the objection when the evidence is introduced at trial; but
- c. Does *not* give the appellate court jurisdiction to hear a pretrial challenge to the judge's ruling on the in limine motion.

JUDGE'S PERSPECTIVE

Even if you enter into a stipulation to treat a pretrial evidentiary ruling as binding on the parties, the judge who hears the motion may not agree to make the ruling binding on the trial court.

OBTAIN DATE FOR PRETRIAL MOTIONS

If pretrial motions are appropriate, obtain a date for such motions at or before the pretrial conference. Check with your court to determine local practice.

SPECIFIC PRETRIAL MOTIONS

DETERMINE WHETHER PRETRIAL MOTION APPROPRIATE

Ask yourself if your case falls within any of the following situations (for how to file motions, see [step 37](#), below):

NEED ADDITIONAL DISCOVERY

Do you need additional discovery?

If Yes

File a formal **discovery motion**. See [steps 26-29](#), above, for discovery procedures, and [Appendix B](#) for list of common discovery motions.

CASE CONCERNS PEACE OR CUSTODIAL OFFICER

Does case involve peace or custodial officer, *i.e.*:

a. Is the client charged with, *e.g.*:

- (1) Resisting arrest or taking a weapon or firearm from a peace or custodial officer (see [Pen C §148](#) for specifics of charge); or
- (2) Battery against a peace or custodial officer (see [Pen C §243](#) for specifics of charge); or

b. Will the credibility of police or custodial officers be in question?

If Yes

Consider a ***Pitchess*** motion. [Evid C §§1043-1047](#); [Pitchess v Superior Court \(1974\) 11 C3d 531, 113 CR 897](#); [Crim Law §§11.19-11.25A](#). See [Appendix B](#) for further case references.

JUDGE'S PERSPECTIVE

You must show good cause to obtain discovery with this motion. See [City of Santa Cruz v Municipal Court \(1989\) 49 C3d 74, 260 CR 520](#), and [City of San Jose v Superior Court \(1998\) 67 CA4th 1135, 79 CR2d 624](#).

CASE BASED ON CONFIDENTIAL INFORMANT

Does case involve informant, *i.e.*:

a. Was your client arrested as a result of information supplied by a confidential informant?

b. Do you need to know who the informant is because informant's information is material to guilt or innocence?

If Yes

Consider a **motion to disclose the identity of the informant**. See [Eleazer v Superior Court \(1970\) 1 C3d 847, 83 CR 586](#); see [Crim Law, chap 17](#). See [Appendix B](#) for further case references.

JUDGE'S PERSPECTIVE

Recognize that you have the burden of proof to show that:

a. The informant would be a material witness on the issues of guilt; and

b. Your client will be deprived of a fair trial if you cannot discover the identity. See [Honore v Superior Court \(1969\) 70 C2d 162, 168, 74 CR 233](#). See also [step 28](#), above.

NEED EXPERT ASSISTANCE

Does your client need financial assistance to retain an expert to:

a. Test evidence;

b. Conduct physical or mental examination of the client; or

c. Give an opinion?

If Yes

File a motion for **appointment of expert**. See [step 30](#), above; [Evid C §730](#); see [Torres v Municipal Court \(1975\) 50 CA3d 778, 123 CR 553](#).

JUDGE'S PERSPECTIVE

The court has discretion to grant or deny this motion and will consider whether your client is indigent or can afford the expert.

CLIENT IS A MINORITY

Is your client a member of a minority group who feels he or she is being prosecuted because of this?

Example: Your client was the only person arrested from a group for a fireworks offense, and your client is Asian.

If Yes

File a **Murgia discovery motion**. See [Murgia v Municipal Court \(1975\) 15 C3d 286, 124 CR 204](#); see [Crim Law §11.30](#).

JUDGE'S PERSPECTIVE

The court will determine whether additional discovery is warranted because defendant has been the subject of "intentional and purposeful invidious discrimination" in being prosecuted. See [Murgia v Municipal Court \(1975\) 15 C3d 286, 124 CR 204](#).

If the court grants this motion, and in the information disclosed you discover a basis for dismissal, file a *separate* motion to dismiss. See [step 39](#), below. On motions to dismiss due to discriminatory prosecution, see [Crim Law §§18.16-18.25](#).

CASE IS VINDICTIVE PROSECUTION

Does the prosecutor appear to be motivated by vindictiveness?

Example: Prosecutor rejects a reasonable plea bargain and files a felony charge.

If Yes

File a **motion to dismiss for vindictive prosecution**. See [Twiggs v Superior Court \(1983\) 34 C3d 360, 369, 194 CR 152](#). See [Crim Law §§18.16-18.25](#).

PROSECUTION HAS CONFLICT

Does any member of the DA's office have a conflict with your case?

Example: If victim or witness is a prosecutor, that person's office and that particular prosecutor should be recused.

If Yes

File a **recusal motion**. [Pen C §1424](#); see [Crim Law §§18.26-18.31](#).

EVIDENCE IMPROPERLY SEIZED

Was evidence seized as a result of an invasion of your client's rights under the Fourth Amendment?

If Yes

File a **motion to suppress evidence under Pen C §1538.5**. See [Crim Law, chap 16](#).

RESEARCH PRETRIAL MOTIONS

CONDUCT LEGAL RESEARCH

To determine whether you have grounds for any pretrial motion, consult:

- a. Resources listed in [Appendix C](#); and
- b. Statutes and cases for specific motions (see above; [Appendixes B-C](#)). See also [Appendix E](#).

Checklists: See [Appendix A](#) for checklist to use in determining whether to bring a pretrial motion; see [Appendix B](#) for statutory and case law for common pretrial motions, including additional motions not listed in this step; see [Appendix C](#) for pretrial motion research resources.

Source: Criminal Law/Defending Your Client in a Misdemeanor Case (Including a DUI) (Action Guide)/When Making Pretrial Motions/STEP 37. PREPARE AND FILE PRETRIAL MOTIONS

STEP 37. PREPARE AND FILE PRETRIAL MOTIONS

PREPARE MOTION

Include in notice and motion:

Notice and Motion

- a. Proper caption of the case and court number;
- b. Description of the specific motion being made, *e.g.*, Notice of Motion and Motion To Suppress Evidence Pursuant to Pen C §1538.5;
- c. In the body of the motion, identification of the legal theory and the specific action requested; and
- d. Date and location of hearing.

Memorandum

Generally:

- a. Do not simply cite a statute or case; but
- b. Explain why the statute or case determines the issue presented.

JUDGE'S PERSPECTIVE

You will not persuade the judge with memorandums consisting of *boilerplate*.

Do include statements and legal authority that establish:

- a. Who has the burden of proof; and
- b. What burden of proof or standard the judge should apply in the context of facts of your case, *e.g.*, preponderance of evidence.

Declaration

Give the facts necessary for the judge to conclude that the motion has merit.

Proof of Service

Attach proof of service to the motion to show that you gave notice to the proper parties.

FILE AND SERVE THE MOTION

- a. Serve notice and motion on all parties;
- b. Complete proof of service;
- c. File notice, motion, and proof of service with the court clerk; and
- d. Give courtesy copy to the judge before the hearing.

WHEN TO NOTICE MOTION

Check your local rules of court to determine when you must notice any pretrial motions.

WHEN TO FILE AND SERVE MOTION

- a. Check your local rules of court for the deadline to file written motions.

Example: In San Francisco, many motions in pending cases must be filed at least 15 calendar days before the hearing date. See San Francisco Uniform Local Rules of Court, Rule 16.9 (also located at http://www.sfgov.org/site/uploadedfiles/courts/rule_16.pdf).

b. Check statute governing the pretrial motion for any other deadlines.

Example: If you do not file and serve (CCP §1005.5) your pretrial motion to suppress evidence (Pen C §1538.5) within 45 days after arraignment, you are not entitled to review before conviction. Pen C §1510.

UPDATE YOUR RESEARCH BEFORE HEARING

Be sure to update your research after filing your motion and before you appear in court for oral argument.

JUDGE'S PERSPECTIVE

Unless you update your research, you may miss important new law on issues raised in pretrial motions.

Further Research: See Crim Law, chap 18.

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Source: Criminal Law/Defending Your Client in a Misdemeanor Case (Including a DUI) (Action Guide)/When Making Pretrial Motions/STEP 38. CONSIDER MOTION TO CHALLENGE JUDGE

STEP 38. CONSIDER MOTION TO CHALLENGE JUDGE

WHEN APPROPRIATE

For Cause

When you have facts showing that the judge is biased against you or your client, motion to challenge judge is appropriate. CCP §§170.1-170.3.

Peremptory

When you have reason to believe that the judge cannot be fair and impartial in the particular case, motion to challenge judge is appropriate, without setting forth specific facts showing bias. CCP §170.6.

DEADLINE TO CHALLENGE FOR CAUSE

Challenge as soon as practicable after you discover facts constituting grounds for disqualification. CCP §170.3(c)(1).

DEADLINE FOR PEREMPTORY CHALLENGE

Under CCP §170.6(2), challenge *before* the judge has heard any contested issue of fact; AND (depending on how cases are assigned in your court):

- a. 10 days after notice of the assignment, if judge is assigned to a case for all purposes;
- b. 5 days before trial or hearing, if judge is assigned to conduct the trial or hearing 10 days before the trial or hearing;
- c. *At the time of assignment*, if judge is assigned by a master calendar system (make challenge to master calendar judge); or
- d. 30 days after your client first appears, if the court has only one judge.

HOW TO CHALLENGE

For Cause

To challenge for cause:

- a. File with the clerk a verified statement setting forth the facts establishing the bias of the judge.
- b. Serve a copy of the statement on each party and personally on the judge or the judge's clerk. CCP §170.3(c)(1).

Peremptory

To make a peremptory challenge, make a written or oral motion supported by a declaration or oral statement under oath, stating that you do not believe that your client can have a fair and impartial trial or hearing before the judge. CCP §170.6(2); see sample affidavit in CCP §170.6(5). For sample form, see Crim Law Forms Man §21.1.

Source: Criminal Law/Defending Your Client in a Misdemeanor Case (Including a DUI) (Action Guide)/When Making Pretrial Motions/STEP 39. INFORMALLY REQUEST DISMISSAL UNDER PEN C §1385

STEP 39. INFORMALLY REQUEST DISMISSAL UNDER PEN C §1385

WHEN AVAILABLE

a. Under Pen C §1385, the court may "in the furtherance of justice" dismiss:

- (1) One or more counts, or
- (2) The entire action.

NOTE

The court has tremendous powers to exercise discretion in dismissal of counts or charges.

Example: Judge concluded that trial would only serve to harass a defendant because defendant was already in prison, and the charge that the court dismissed could result only in a concurrent sentence. People v Superior Court (Mowry) (1971) 20 CA3d 684, 97 CR 886.

b. Be aware that a motion to dismiss under Pen C §1385 may be brought by:

- (1) Court on its own motion; or
- (2) Prosecuting attorney.

JUDGE'S PERSPECTIVE

You do not have a right to bring a motion under this section, but you may informally request that the judge dismiss the case. See People v Superior Court (Flores) (1989) 214 CA3d 127, 262 CR 576.

Use this section to, *e.g.*:

- a. Request the court to dismiss on its own motion when client went to trial and the jury was unable to reach a verdict;
- b. Ask the prosecutor to dismiss charges remaining after you have negotiated a plea.

WHEN NOT AVAILABLE

The court cannot dismiss the charge when (Pen C §1385):

- a. The legislature has expressed a contrary intent; or
- b. The reason for the dismissal would be a ground for a demurrer, other than lack of jurisdiction or failure to state a public offense (Pen C §1012).

Further Research: See generally People v Superior Court (Romero) (1996) 13 C4th 497, 53 CR2d 789. The court's power to dismiss in the interest of justice is discussed in Crim Law §§25.8-25.20.

IF COURT GRANTS DISMISSAL

Make sure that the court complies with Pen C §1385 by stating the *reasons* for the dismissal in the minutes or written order. Pen C §1385(a); People v Orin (1975) 13 C3d 937, 944, 120 CR 65.

JUDGE'S PERSPECTIVE

Check the minute order or its equivalent to see that the court sets forth the reasons; if reasons are not included, the requirements of Pen C §1385 have not been fulfilled.

You should make sure that the reasons are included, so that if the prosecutor appeals the dismissal, the court of appeal can decide whether the trial court reasonably exercised discretion in dismissing the charge.

Source: Criminal Law/Defending Your Client in a Misdemeanor Case (Including a DUI) (Action Guide)/Before and During Jury Trial/STEP 40. PREPARE YOURSELF TO GO TO TRIAL

Before and During Jury Trial

STEP 40. PREPARE YOURSELF TO GO TO TRIAL

EXPECT CASE TO GO TO TRIAL

You should not accept a criminal case unless you are prepared to conduct a jury trial. For discussion, see [step 4](#), above.

Trial May Be Unlikely

It may seem excessive to treat every case as if it will go to trial when the overwhelming majority of cases do *not* go to trial; BUT

Trial Preparation Necessary

To be effective in your pretrial or motion work, you must be thoroughly prepared and sincerely expect to go to jury trial if necessary, *i.e.*, if you are unwilling or afraid to go to trial, your effectiveness will be significantly lessened and the outcome for your client will be worse than it should be.

OBSERVE OTHER ATTORNEYS IN TRIAL

If you have never conducted a jury trial, take the time to observe others who are skilled in trial work.

JUDGE'S PERSPECTIVE

Observe the judges who are likely to preside over your client's trial when they conduct other jury trials.

TAKE SEMINARS AND READ

Attend trial seminars and read resource books to:

- a. Learn strategies and techniques; and
- b. Practice your trial skills before actually appearing in court.

See [Appendix C](#) for a partial list of trial reference books. See also [Crim Law §1.22](#).

BECOME FAMILIAR WITH TRIAL PROCEDURE

Simply stated, a trial proceeds as follows (see [Pen C §1093](#)):

Settlement Conference

Trial begins when you, prosecutor, and the judge meet informally to discuss the case during the settlement conference. See [step 41](#), below.

Jury Selection

Your first courtroom exposure will be the jury selection process. See [steps 43-44](#), below.

Opening Statements

Opening statements give both sides a chance to explain their perspectives on what the evidence will show to the jury. See [step 45](#), below.

Prosecution Case

- a. Prosecutor will present evidence.

b. You may cross-examine each witness. See [step 47](#), below.

JUDGE'S PERSPECTIVE

If the prosecutor has exhibits, he or she will move them into evidence after the last prosecution witness (unless previously admitted).

Keep track during trial of the *prosecution* exhibits, and note whether you are going to object and on what basis.

Motion for Acquittal

Outside the presence of the jury, move for acquittal. See [Pen C §1118.1](#); see also [step 48](#), below.

JUDGE'S PERSPECTIVE

You may also move for acquittal at the close of *your* evidence, before the case is submitted to the jury for decision. See [Pen C §1118.1](#).

Defense Case

Present your evidence at the close of prosecutor's case. See [step 51](#), below.

Prosecution Rebuttal

Prosecutor may present rebuttal witnesses after your evidence is completed.

Closing Argument

- a. Prosecutor makes closing argument;
- b. You make closing argument (see [step 51](#), below); and
- c. Prosecutor makes last closing argument.

Jury Instructions

Court gives instructions to the jury. See [step 42](#), below.

Source: Criminal Law/Defending Your Client in a Misdemeanor Case (Including a DUI) (Action Guide)/Before and During Jury Trial/STEP 41. PREPARE FOR AND ATTEND THE SETTLEMENT CONFERENCE

STEP 41. PREPARE FOR AND ATTEND THE SETTLEMENT CONFERENCE

OBJECTIVE

Purpose of settlement conference is to take care of courtroom issues before the jury is chosen, by meeting with judge and prosecutor, usually in judge's chambers.

DISCUSS SETTLEMENT OF THE CASE

This will be your last opportunity to try to reach a disposition of the case short of beginning a jury trial. See [step 33](#), above.

JUDGE'S PERSPECTIVE

Be aware that many judges refuse to discuss settlement on the trial date.

DISCUSS GROUND RULES

Discuss how the judge will conduct the trial, *e.g.*:

- a. Judge will ask for your estimate of how long the case will take and number of witnesses;
- b. Judge will usually tell you about logistical problems and his or her normal schedule (*e.g.*, hears arraignments from 9 a.m. to 10 a.m., civil settlement conferences from 1 p.m. to 2 p.m.);
- c. Judge will usually tell you any special policies for his or her courtroom, *e.g.*, concerning voir dire. For discussion of voir dire, see [step 43](#), below.

DISCUSS EVIDENTIARY ISSUES

The judge will want to know whether you anticipate:

- a. Any evidentiary motions that will come up during trial.
- b. Any [Evid C §402](#) hearings to determine the existence of a preliminary, foundational fact, *e.g.*, the voluntariness of defense statement, that you want the court to hear.

JUDGE'S PERSPECTIVE

Consider advising the judge before trial begins about *potential* evidentiary issues that may arise at trial. Judges appreciate knowing about these issues to estimate the length of the trial and to schedule any in limine hearings so as to avoid having jurors waiting for long periods. By raising evidentiary issues early, you avoid having the evidence come in before you can object, *e.g.*, a witness testifies to a statement purported to be attributable to your client before you can state your objection.

SCHEDULE AND CONDUCT EVIDENTIARY MOTIONS

Conduct [Evid C §402](#) hearings to determine the existence of a preliminary, foundational fact. See [step 42](#), below.

NOTE

Most judges conduct [Evid C §402](#) hearings *before* swearing in the panel of prospective jurors to reduce the inconvenience to jurors caused by delay. Remember that rulings before the swearing of the jury are not binding. See [step 37](#), above.

DISCUSS VOIR DIRE

Discuss voir dire questions that court will ([CCP §223](#)):

- a. Ask the jury; and

- b. Allow you to ask.

DISCUSS JURY INSTRUCTIONS

Find out when:

Attorneys Submit Instructions

Judge wants you to submit jury instructions before the conference. All proposed instructions must be delivered to the court before commencement of argument. See Pen C §1093.5.

Judge Gives Instructions

The timing of jury instructions varies from judge to judge:

- a. Some judges like to give some jury instructions, usually the instructions that relate to the specific legal issues raised by the facts of the case, *before* closing argument.
- b. Some judges give all instructions after closing argument.

JUDGE'S PERSPECTIVE

Find out whether your trial judge instructs the jury before or after counsel's arguments, because you will want to be prepared to use the instructions during argument to support your theory of the case.

MOVE TO EXCLUDE WITNESSES

If you want to have witnesses excluded from the courtroom while other witnesses are testifying, ask the court before the jury is called. See Evid C §777.

JUDGE'S PERSPECTIVE

It is usually a good idea to exclude witnesses so that they cannot hear the testimony of other witnesses. Remember that the court has discretion to grant or deny this motion and that a party cannot be excluded (Evid C §777(b)). The judge will advise the witnesses of an exclusion order and will admonish witnesses not to discuss the case with each other during the course of the trial.

Source: Criminal Law/Defending Your Client in a Misdemeanor Case (Including a DUI) (Action Guide)/Before and During Jury Trial/STEP 42. ANTICIPATE EVIDENCE ADMISSIBILITY QUESTIONS

STEP 42. ANTICIPATE EVIDENCE ADMISSIBILITY QUESTIONS

OBJECTIVE

Anticipate and prepare for evidence admission problems before trial begins, *e.g.*, consider:

- a. Whether to object to prosecution evidence (see below); and
- b. How to overcome objections to your evidence.

REVIEW ISSUES IN CASE

Review:

- a. Elements prosecution must prove;
- b. Elements of possible defenses; and
- c. Burden of proof and other elements of the case.

REVIEW RULES OF EVIDENCE

Review and understand the rules of evidence, *e.g.*:

- a. Requirements for admissibility, including preliminary (foundational) facts that must be shown;
- b. Hearsay rule and exceptions;
- c. Privilege;
- d. Impeachment;
- e. Admissibility of writings; and
- f. Admissibility of physical and demonstrative evidence.

Further Research: See Laying a Foundation To Introduce Evidence (Preparing and Using Evidence at Trial) (Cal CEB Action Guide April 2006), referred to throughout this Action Guide as Laying a Foundation; Jefferson's California Evidence Benchbook (3d ed CJA-CEB 1997), referred to throughout this Action Guide as Evidence Benchbook; Effective Direct & Cross-Examination (Cal CEB 1986), referred to throughout this Action Guide as Direct & Cross; Effective Introduction of Evidence in California (2d ed Cal CEB 2000), referred to throughout this Action Guide as Effective Intro of Evidence; Imwinkelried, Wydick & Hogan, California Evidentiary Foundations (3d ed Lexis 2000), referred to throughout this Action Guide as Evidentiary Foundations.

TO EXCLUDE EVIDENCE

CONSIDER PROSECUTION EVIDENCE

- a. Consider evidence that prosecutor will want admitted and you want to keep out; and
- b. Be prepared to argue against all of prosecutor's possible theories of admissibility.

Example: A prosecutor who wants to introduce evidence of defendant's uncharged misconduct may argue that it is relevant to identity, common design or plan, intent, and motive.

JUDGE'S PERSPECTIVE

When deciding whether to object to evidence the prosecution presents, consider:

- a. The effect if the court refuses to admit an exhibit because of your objection, *e.g.*, will the prosecution lack evidence to prove an element of its case?
- b. Whether *you* may need a prosecution exhibit to support your theory of the case. If the exhibit is not admitted, you cannot argue from it before the jury.
- c. If evidence is not harmful to your theory of the case, weigh:
 - (1) The benefit of having the court sustain your objection; against
 - (2) Possible detriment to your client if the jurors get the impression you are trying to hide something.

HOW TO OBJECT TO PROSECUTOR'S EVIDENCE

Consider asking for an Evid C §402 hearing when admissibility depends on establishing the existence of a preliminary fact.

Example 1: You should ask for an Evid C §402 hearing when you believe you can establish that an admission or statement made by your client was coerced or otherwise involuntary.

Example 2: When the prosecution proposes to introduce expert testimony, you should consider asking for a preliminary fact hearing to require the prosecutor to establish that (1) the subject is a proper subject for expert testimony and (2) material on which the expert bases the opinion is appropriate for expert reliance. This hearing will also give you an opportunity to assess the expert's credibility.

JUDGE'S PERSPECTIVE

The judge will be more persuaded by your argument if you have provided written points and authorities, or at least copies of cases or statutes for the judge to read, *before* you make *any* objection.

Motion in Limine

Prepare a motion in limine to challenge admission of prosecutor's evidence on other grounds, *e.g.*, challenge to company's subpoenaed records as not being kept in the ordinary course of business.

Further Research: See Laying a Foundation for further discussion of Evid C §§402-405 hearings.

JUDGE'S PERSPECTIVE

During trial, keep track of the prosecutor's exhibits, and note whether you are going to object when the prosecutor moves them into evidence.

TO ADMIT EVIDENCE

CONSIDER ADMISSIBILITY OF YOUR EVIDENCE

Explore every alternative for:

- a. Admitting evidence that is favorable to your client; and
- b. Meeting prosecutor's probable objections.

IDENTIFY ELEMENTS FOR ADMISSIBILITY

Research the preliminary or foundational facts you will need to show before the court will admit a piece of evidence. See Evid C §§400-403.

SATISFY FOUNDATIONAL REQUIREMENTS

Know and be prepared to demonstrate all required foundational elements for each item of evidence.

Example: When a hearsay statement is admissible only if the declarant is unavailable, it is not enough to show that the declarant is in fact unavailable. You must also show that you exercised due diligence in trying to secure the declarant's presence as a witness. See Evid C §240(a)(5). You should be prepared with admissible evidence showing that you, *e.g.*, issued a timely subpoena or made diligent efforts to locate the witness.

DECIDE WHEN TO PRESENT FOUNDATION

You will want the evidence to be presented in a logical fashion to the jury, *e.g.*:

Logical Order

Usually, you will begin with the foundation and then introduce the evidence.

Most Powerful First

Because you want to present your evidence in the most powerful and effective manner:

- a. Sometimes you will present the evidence that is most powerful, followed by the foundational issue.
- b. If prosecutor objects based on lack of proper foundation, ask the judge to admit the evidence, provided you lay the foundation at a later time.

If No Objection to Foundation

When you know the prosecutor will not object to the foundational fact, you may be able to present evidence on the central issue and avoid the foundation.

NOTE

In most situations, you will not know in advance whether prosecutor will object.

Further Research: See Laying a Foundation.

Source: Criminal Law/Defending Your Client in a Misdemeanor Case (Including a DUI) (Action Guide)/Before and During Jury Trial/STEP 43. PREPARE FOR AND PARTICIPATE IN JURY VOIR DIRE

STEP 43. PREPARE FOR AND PARTICIPATE IN JURY VOIR DIRE

WHY IMPORTANT

Selecting the jury may be the key to winning the trial. Be sure to obtain enough information on voir dire to:

- a. Eliminate those jurors who are inclined to convict your client; and
- b. Try to preserve as many favorable jurors as possible.

JUDGE'S PERSPECTIVE

Some courts encourage counsel to make short "mini-opening statements" to the jury panel before voir dire. Find out whether the judge in your case uses this approach and, if so, determine whether under the circumstances it is in your client's best interest to adopt this procedure.

PREPARE FOR VOIR DIRE

REVIEW VOIR DIRE PROVISIONS OF CCP §223

Voir dire in criminal cases is regulated by CCP §223:

- a. Voir dire questions are limited to those that will lead to challenges for cause.
- b. Court
 - (1) Conducts the initial examination (for sample questions, see Cal Rules of Ct, Standards of J Admin 4.30(b)); and
 - (2) May solicit additional questions from counsel.
- c. After the court's initial voir dire, you and the prosecutor have the right to question prospective jurors, subject to court's discretion to:
 - (1) Set time limits; and
 - (2) Control the scope of questioning.

JUDGE'S PERSPECTIVE

Ask the judge how he or she handles voir dire. Find out what questions the judge will have already covered so you do not repeat these questions, and what restrictions or time limitations the judge will apply.

RECOGNIZE OTHER GOALS OF VOIR DIRE

If carefully crafted, questions directed at uncovering grounds for a challenge for cause may also serve other goals for voir dire, *e.g.*:

- a. Enabling you to make meaningful peremptory challenges;
- b. Educating the jury:
 - (1) Review jury instructions and consider preparing specific questions in light of applicable instructions;
 - (2) Disclose evidence, *e.g.*, "The evidence will include information about my client's prior felony conviction. Will this affect your ability to give my client a fair trial?";

- c. Taking the sting out of difficult subject matter (*e.g.*, bloody photos); and
- d. Warming the jury up to you and your client (*e.g.*, use your client's name).

JUDGE'S PERSPECTIVE

Recognize that the court's goals may not coincide with goals of either counsel, *e.g.*, judges often will *not* permit voir dire that will "educate the jury" about the evidence, in order to prevent the jury from prejudging the evidence.

Some judges have stricter interpretations than others of what kind of questions will assist in making a challenge for cause. In reviewing any written questions you have prepared, identify what category the question falls under, *i.e.*, challenge for general disqualification, implied bias, or actual bias. By making a notation next to the question as to how it goes to cause, you will be able to respond to any objection to the particular question. Most courts will not permit you to question jurors as to the law or to ask questions that attempt to indoctrinate the jurors. Keep in mind that judges usually set time limits on voir dire; you don't want to use up your time arguing objections.

RECOGNIZE PURPOSE OF QUESTIONS

Remember that you are not looking for the correct answer; you want information from each prospective juror to decide whether to:

- a. Challenge the juror for cause, *i.e.*, object to juror because (see CCP §225(b)(1)):
 - (1) Juror is not qualified (see CCP §228); or
 - (2) Juror has an actual or implied bias (see CCP §§225(b)(1)(B), (C), 229); or
- b. Make a meaningful peremptory challenge, *i.e.*, to object to the juror without giving any reason. See CCP §225(b)(2).

JUDGE'S PERSPECTIVE

Peremptory challenges are statutorily created and are not of constitutional origin. See People v Bittaker (1989) 48 C3d 1046, 1086, 259 CR 630, citing Ross v Oklahoma (1988) 487 US 81, 88, 101 L Ed 2d 80, 108 S Ct 2273.

PREPARE YOUR SPECIFIC QUESTIONS

Be prepared with specific questions for (see CCP §223):

- a. Judge to ask the prospective juror; or
- b. You to ask.

NOTE

Judge may require you to submit these questions *in writing* before the settlement conference. See step 41, above.

GET TRAINING

The best way to master the art of voir dire is to attend trainings and seminars on the topic.

PARTICIPATE IN VOIR DIRE

JUDGE BEGINS QUESTIONING

Voir dire begins with the judge asking:

- a. General questions of the panel; and
- b. Then specific questions of individual jurors (for sample questions, see Cal Rules of Ct, Standards of J Admin 4.30(b)).

WHEN QUESTIONING JURORS

Be Engaging and Sincere

When you talk with a prospective juror, you want juror to:

- a. Like you as a person; and
- b. Feel comfortable with you and want to share information with you.

Develop Your Style

- a. Assess your personality and style.
- b. As a general rule, you are better off being yourself rather than playing a role.
- c. Vary style depending on:
 - (1) Type of client;
 - (2) Factual context of case; and
 - (3) Sophistication of jurors, *e.g.*, if the majority of jurors are not sophisticated about the law, you might take greater pains to explain.

EVALUATE JUROR RESPONSES

Decide whether you should challenge the juror by evaluating each response of juror in the context of:

Court Location

Location of the court, *e.g.*, in a rural location you might encounter more conservative values, compared with a diverse metropolis.

Offense

Nature of the offense;

Defendant

Social, cultural, or economic background of the defendant, *e.g.*, juror says that tattoos are signs of criminality, and defendant has visible tattoos;

Current Events

Current news events;

Other Participants

Social, cultural, or economic background of:

- a. Victim;
- b. Prosecution witnesses;
- c. Any defense witnesses.

EVALUATE THEORIES OF JURY SELECTION

Recognize that, while jury selection is perhaps the most studied area of trial work:

- a. Theories of jury selection are not always applicable to your case; and
- b. Before adopting any recognized theory of jury selection, you should evaluate whether the theory makes sense to you and your case in your community.

Further Research: See Crim Law, chap 29.

Source: Criminal Law/Defending Your Client in a Misdemeanor Case (Including a DUI) (Action Guide)/Before and During Jury Trial/STEP 44. IF APPROPRIATE, CHALLENGE JURORS

STEP 44. IF APPROPRIATE, CHALLENGE JURORS

WHEN APPROPRIATE

For Cause

Challenge the juror for cause when juror (see CCP §225; see below):

- a. Is not qualified (CCP §228); or
- b. Has actual or implied bias (see CCP §§225, 229).

Peremptory

Make a meaningful peremptory challenge when you believe that a juror is inclined to convict your client.

RECOGNIZE ORDER OF CHALLENGES

The court will ask for challenges in the following order:

Cause Challenges

Challenges for cause are exercised before peremptory challenges may be exercised (CCP §226(c)-(d)):

- a. You exercise all your challenges for cause *first*; and
- b. Prosecutor then exercises cause challenges.

JUDGE'S PERSPECTIVE

To make a challenge for cause, approach the side bar and state grounds for the challenge.

After you challenge and juror is excused, determine whether there is a challenge for cause against the replacement juror.

If you have no challenge to the replacement juror or any of the group, state in front of the jury that you "pass for cause."

Peremptory Challenges

Order of peremptory challenges (CCP §231(d)-(e)):

- a. Prosecutor exercises one peremptory challenge first;
- b. You exercise one peremptory challenge; and
- c. Prosecutor and you repeat this order until both sides pass.

JUDGE'S PERSPECTIVE

To make a peremptory challenge, ask the court in front of the jury (not at the side bar) to thank and excuse the juror you are challenging. Do not state a reason on the record. Keep a note of why you challenge a juror in case the prosecution objects to your challenges as a systematic exclusion of any cognizable groups, such as gays and lesbians (People v Garcia (2000) 77 CA4th 1269, 92 CR2d 339); African-American men (People v Gray (2001) 87 CA4th 781, 104 CR2d 848); and Hispanics (People v Harris (1984) 36 C3d 36, 201 CR 782); see CCP §231.5.

Remember, a party may not use a peremptory challenge to remove a prospective juror on the assumption that the juror is biased merely because of his or her race, color, religion, sex, national origin, sexual orientation, or similar grounds. CCP §231.5.

When you exercise a peremptory challenge, the prosecutor can exercise a challenge for cause to the replacement juror, or a

peremptory challenge as to *any* of the previous jurors (even if the panel was previously accepted by the prosecution). The same is true for your client, if the prosecutor exercises a challenge after you had accepted the panel.

Further Research: See *People v Harris*, *supra*, for discussion of cognizable groups; see also Crim Law §29.30.

ACCEPT THE PANEL

When you and your client are satisfied, you accept the panel, and the jurors are sworn. See CCP §231.

REPEAT FOR ALTERNATE JURORS

Repeat the process for alternate jurors. See CCP §234.

JUDGE'S PERSPECTIVE

Ask the judge what method is used to determine alternate jurors. Some judges ask counsel to stipulate to picking jurors and waiting until the close of the case to determine which of the panel will be designated as alternates. For example, you may be asked to select 14 jurors. Two of the 14 will be randomly selected before deliberations and deemed alternate juror.

CHALLENGES FOR CAUSE

REVIEW GENERAL DISQUALIFICATIONS

Challenge if prospective juror, *e.g.*:

- a. Not a citizen (CCP §203(a)(1));
- b. Not a resident of the county where the trial is taking place (CCP §203(a)(4));
- c. Would suffer undue hardship (CCP §204(b));
- d. Is unable to understand English (CCP §203(a)(6));
- e. Is a peace officer (CCP §219).

NOTE

The judge will excuse jurors who are obviously disqualified, *e.g.*, felons, noncitizens. See CCP §203 for disqualifying characteristics.

REVIEW IMPLIED BIAS DISQUALIFICATIONS

Challenge on the grounds of implied bias, when prospective juror has:

- a. Close or special relationship with (CCP §229(a)-(b)):
 - (1) Parties;
 - (2) Witnesses;
 - (3) Attorneys; or
 - (4) Victims;
- b. Special interest in the events of the case (CCP §229(d));
- c. Unqualified opinion or belief as to the merits of the case, founded on knowledge of facts (CCP §229(e)); or
- d. Involvement in prior legal proceedings related to the case. CCP §229(c), (g).

JUDGE'S PERSPECTIVE

Be sure to review CCP §229 before making a challenge on the basis of implied bias.

REVIEW ACTUAL BIAS DISQUALIFICATION

Challenge for actual bias if you believe prospective juror would be unable to act (CCP §225(b)(1)(C)):

- a. With "entire impartiality"; AND
- b. Without prejudice to the "substantial rights of any party."

Further Research: See Crim Law §29.24.

PEREMPTORY CHALLENGES

REVIEW NUMBER OF PEREMPTORY CHALLENGES

In most cases (when the maximum sentence would be more than 90 days) (CCP §231(a)-(b)):

If One Defendant

If a defendant is tried alone, each party gets:

- a. 10 peremptory challenges (CCP §231(a)); plus
- b. 1 additional challenge for each alternate juror to be seated (CCP §234).

If More Than One Defendant

If 2 or more defendants are tried together (CCP §231(a)):

- a. Defendants share 10 joint peremptory challenges;
- b. Each defendant gets 5 individual challenges;
- c. Each defendant gets 1 additional challenge for each alternate juror to be seated (CCP §234); and
- d. Prosecution gets an equal number of challenges.

WATCH FOR DISCRIMINATORY PATTERN OF CHALLENGES

- a. If prosecutor engages in a pattern of challenges that excludes a particular class of jurors, ask court for a mistrial (often referred to as a *Wheeler-Batson* motion; see *Batson v Kentucky* (1986) 476 US 79, 90 L Ed 2d 69, 106 S Ct 1712; *People v Wheeler* (1978) 22 C3d 258, 148 CR 890, overruled in part in *Johnson v California* (2005) 545 US 162, 168, 162 L Ed 2d 129, 138, 125 S Ct 2410); and
- b. Do not yourself engage in a discriminatory pattern of challenges (*Georgia v McCollum* (1992) 505 US 42, 120 L Ed 2d 33, 112 S Ct 2348 (defendant cannot engage in purposeful racial discrimination in exercising peremptory challenges)).

OBJECT IF DISCRIMINATORY PATTERN

If you ask court for a mistrial, court will:

- a. Ask you to make a prima facie showing that prosecutor excluded juror(s) based on group bias (see *Johnson v California* (2005) 545 US 162, 168, 162 L Ed 2d 129, 138, 125 S Ct 2410; *People v Cornwell* (2005) 37 C4th 50, 66, 33 CR3d 1);
- b. If you make prima facie case, ask prosecutor to state neutral reason for challenges (*People v Turner* (1994) 8 C4th 137, 164, 32 CR2d 762);
- c. Evaluate prosecutor's reasons and determine whether you have proved purposeful discrimination (see *Purkett v Elem* (1995) 514 US 765, 768, 131 L Ed 2d 834, 839, 115 S Ct 1769; *Miller-El v Dretke* (2005) 545 US 231, 239, 162 L Ed 2d 196, 213, 125 S Ct 2317); and

d. Dismiss the venire and begin jury selection anew if it finds purposeful discrimination in prosecutor's use of any peremptory challenge (*People v Wheeler* (1978) 22 C3d 258, 282, 148 CR 890, overruled in part in *Johnson v California* (2005) 545 US 162, 168, 162 L Ed 2d 129, 138, 125 S Ct 2410).

Further Research: Compare *Miller-El v Dretke* (2005) 545 US 231, 162 L Ed 2d 196, 125 S Ct 2317, with *Purkett v Elem* (1995) 514 US 765, 131 L Ed 2d 834, 115 S Ct 1769. For discussion, see Crim Law §§29.30-29.37.

NOTE

The motion for a mistrial must be made before the jury is sworn. *People v Perez* (1996) 48 CA4th 1310, 1314, 56 CR2d 299.

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Source: Criminal Law/Defending Your Client in a Misdemeanor Case (Including a DUI) (Action Guide)/Before and During Jury Trial/STEP 45. PREPARE AND PRESENT YOUR OPENING STATEMENT

STEP 45. PREPARE AND PRESENT YOUR OPENING STATEMENT

OBJECTIVE

Goal of opening statement is to:

- a. Provide a road map of the evidence for the jury to follow during trial; and
- b. Make the most of one of your few opportunities to speak directly to the jury.

WHEN TO MAKE

CONSIDER WHEN YOU CAN MAKE STATEMENT

Make statement:

- a. At the start of the trial, following the prosecutor's opening statement; or
- b. After prosecution rests and at the beginning of defense.

CHOOSE TIME TO MAKE STATEMENT

After Prosecutor's Opening

There is a strong argument for giving an opening statement at your first opportunity in order to, *e.g.*:

- a. Negate prosecutor's psychological advantage from having made *opening* first; and
- b. Lessen impact of prosecutor immediately following opening statement with presentation of prosecution's evidence.

Before Beginning Defense

Consider reserving your opening, *e.g.*:

- a. To avoid outlining an affirmative defense at the beginning of the trial that you are uncertain you will need to present.
- b. To avoid the possibility of conceding an issue that the prosecution later fails to prove. See discussion of motion to acquit, [step 48](#), below.

NOTE

Some attorneys waive opening statement entirely when the defense consists of arguing that the prosecutor has failed to prove its case, out of concern that making an opening statement will "tip off" the prosecutor to a weakness in the evidence. However, most experienced criminal defense attorneys recommend taking advantage of this opportunity to speak to the jury even in this situation.

RECOGNIZE RESOURCES TO HELP YOU WITH STATEMENT

To help you decide when to make the statement:

Experience

Draw on your own experience.

Discuss With Other Litigators

Discuss your case with other litigators.

Observe Others

Watch other litigators during trial.

Further Research: See Crim Law §§30.21-30.22.

WHAT TO INCLUDE

REVIEW CASE

Obtain a clear understanding of the facts and law of your particular case.

ESTABLISH THEME

- a. Decide on a theme for your case before making an opening statement.
- b. Use the theme in your opening and in your final argument.

GIVE BRIEF SUMMARY OF CASE

Keep the statement as short and concise as possible:

- a. Tell the jurors about the order of the presentation of evidence; and
- b. Ask that they wait to hear the defense case before deciding.

DO NOT OVERSTATE

A key thing to remember is not to overstate and not to promise what you cannot deliver.

Example: If you tell the jury you will put *A* on the stand and you do not, prosecutor will attack you for that, and the jury may doubt your credibility.

DO NOT ARGUE

Do not argue during your opening.

Not Permitted

You cannot argue that "the prosecutor will have a hard time convincing you that the defendant...."

Permitted

You may come close to argument by adding statements such as "*the evidence will show* the complaining witness was lying."

GRAB JURY'S ATTENTION

You want to interest jurors from the start by grabbing their attention.

Avoid

Do not begin your opening with:

- a. The common disclaimer that "what I say is not evidence" (leave that to the prosecutor).
- b. "Thank you" and other insincere, nervous introductions.

Use

Choose a colorful phrase that describes the facts of your case, *e.g.*, "this case is really about the boy who cried 'wolf.'"

BE SINCERE

You want the jury to believe you:

- a. Talk directly *with* the jurors; do not talk *at* them; and
- b. Do not talk in legal jargon. Use language that the jurors will understand.

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STEP 46. MAKE EVIDENTIARY OBJECTIONS AT TRIAL

REVIEW RULES OF EVIDENCE

- a. You must have a solid understanding of the rules of evidence.
- b. Before trial it is always important to:
 - (1) Think through the evidence issues; and
 - (2) Research the law.

Further Research: See Laying a Foundation; Evidence Benchbook; Evidentiary Foundations; Effective Intro of Evidence.

BE PREPARED TO OBJECT

As the prosecutor poses each question, or the witness is giving an answer:

- a. Identify the evidence issue; and
- b. Decide whether to object.

GAIN EXPERIENCE

After time, you will be able to think on your feet when considering an objection.

REVIEW RULES OF EVIDENCE AGAIN

To gain proficiency and become a more professional litigator, study the presentation of evidence and evidence objections again and again, *e.g.*:

- a. Research evidentiary treatises; and
- b. Reread the Evidence Code.

NOTE

In addition to the Evidence Code objections, you should also be alert for questions that are objectionable on due process or other constitutional grounds. See, *e.g.*, *U.S. v Sanchez* (9th Cir 1999) 176 F3d 1214 (cross-examination of defendant compelling defendant to call law enforcement agent liar was prosecutorial misconduct and resulted in reversal of conviction).

Source: Criminal Law/Defending Your Client in a Misdemeanor Case (Including a DUI) (Action Guide)/Before and During Jury Trial/STEP 47. ANTICIPATE AND CONDUCT CROSS-EXAMINATION

STEP 47. ANTICIPATE AND CONDUCT CROSS-EXAMINATION

OBJECTIVE

To impeach the witness, *e.g.*:

Untrue Statements

Get facts to prove that the witness made statements that are untrue or incorrect.

No Personal Knowledge

Get facts that indicate the witness did *not* observe what witness testified about.

Bias

Get facts indicating a bias or prejudice against your client.

Exaggeration

Show that the witness tends to exaggerate.

Bad Memory

Show that the witness has a bad memory.

PRACTICE CROSS-EXAMINATION

While it may seem difficult at the beginning, practice to become skilled at the art of cross-examination, *e.g.*:

Mock Examination

Conduct mock cross-examination with a fellow attorney.

Prepare Your Witnesses

When preparing your client or a witness for trial:

- a. Consider possible cross-examination questions for client or witness; and
- b. Explain and conduct a practice cross-examination with your client or witness.

KNOW ANSWER TO QUESTION

Never ask a question to which you don't know the answer.

Difficult to Follow

This is one of the most often repeated and hardest to follow rules, because in misdemeanor practice you will not already know the answers; compare with:

- a. Cases in which you have a transcript of prior testimony (*e.g.*, after a preliminary hearing in felony cases); or
- b. Civil litigation in which you have a deposition.

Consider Each Question

Before you ask the question:

- a. Thoroughly investigate the witness; and
- b. Carefully consider the possible answers to questions.

LEAD WITNESS

To minimize possibility of the witness giving a narrative answer on cross-examination:

- a. Lead the witness, *e.g.*, "Isn't it true that you said the car was red?"; and
- b. Slant your questions toward "yes" or "no" answers, *e.g.*, "Didn't you report this theft to the police?"

Further Research: See Direct & Cross, chaps 4-5; Crim Law §30.26.

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Source: Criminal Law/Defending Your Client in a Misdemeanor Case (Including a DUI) (Action Guide)/Before and During Jury Trial/STEP 48. MOVE TO ACQUIT AT END OF PROSECUTOR'S CASE

STEP 48. MOVE TO ACQUIT AT END OF PROSECUTOR'S CASE

OBJECTIVE

To have the court acquit defendant on one or more charges because the evidence before the court would be insufficient to sustain a conviction if the case were appealed, make motion for judgment of acquittal. Pen C §1118.1.

JUDGE'S PERSPECTIVE

Make the motion *at the side bar* when the prosecutor states that he or she "rests." See Pen C §1118.1.

WHAT TO DO

Make an oral motion for acquittal under Pen C §1118.1, stating:

Lack of Evidence

That prosecutor failed to present enough evidence to sustain a conviction.

General Motion Sufficient

- a. If you do not specify grounds for the motion, the trial court must consider the sufficiency of all aspects of the prosecution's case. People v Belton (1979) 23 C3d 516, 521, 153 CR 195.
- b. If you do specify the specific issue or count on which prosecutor's case was deficient, the trial court is not obliged to consider issues or counts that you did not specify. People v Ceja (1988) 205 CA3d 1296, 253 CR 132; People v Smith (1998) 64 CA4th 1458, 1466, 76 CR2d 75.

NOTE

Although these rules would appear to favor lack of specificity, be aware that focusing the trial court's attention on the specific evidence or counts you consider insufficient will improve your chances of a favorable ruling.

JUDGE'S PERSPECTIVE

Before the court grants the motion, it may allow the prosecution to amend the complaint to a lesser charge. See People v Garcia (1985) 166 CA3d 1056, 212 CR 822.

EFFECT OF ORDER

If the court grants your motion and acquits defendant, that judgment is not appealable and is a bar to any other prosecution for the same offense. Pen C §1118.2.

Further Research: See Crim Law §§31.44A-31.44B.

STEP 49. PREPARE AND CONDUCT DIRECT EXAMINATION

OBJECTIVE

Goal of direct examination is to let the witness tell the story.

NOTE

While litigators tend to focus on the art of cross-examination, direct examination can be very powerful and convincing if done well.

MEET WITH WITNESSES BEFORE TRIAL

Because it is essential that you know exactly what the witness will say, meet with witnesses and review:

- a. The questions that you will ask them during trial;
- b. The answers the witnesses will give to your questions; and
- c. Possible cross-examination questions the prosecutor will ask.

DO NOT OVERPREPARE WITNESS

Avoid having the witness present "canned" testimony because:

- a. Witness reciting to the jury is not very interesting; and
- b. Canned testimony will probably lessen the witness's credibility.

DO NOT LEAD

Do not lead witnesses.

LET WITNESS TALK TO JURY

You want the witness to speak directly to the jury.

MAKE STORY INTERESTING

Use your direct questions to make the witness's story interesting and logical.

Further Research: See [Direct & Cross](#).

Source: Criminal Law/Defending Your Client in a Misdemeanor Case (Including a DUI) (Action Guide)/Before and During Jury Trial/STEP 50. PREPARE TO OBJECT TO PROSECUTOR'S FINAL AND REBUTTAL ARGUMENT

STEP 50. PREPARE TO OBJECT TO PROSECUTOR'S FINAL AND REBUTTAL ARGUMENT

RECOGNIZE ORDER OF ARGUMENT

Because prosecutor has the burden of proof (see Pen C §1093(e)):

- a. Prosecutor makes the first closing argument;
- b. You make your closing argument; and then
- c. Prosecutor has a final chance to rebut your argument.

BE PREPARED TO OBJECT TO PROSECUTOR'S CLOSING

Make appropriate objections to improper remarks by prosecutor, *e.g.*, most common errors are:

- a. Misstatement of the law;
- b. Misstatement of the facts;
- c. Expression of a personal opinion of defendant's guilt; and
- d. Comments on defendant's use of right to remain silent.

Further Research: See cases cited in Crim Law §30.35.

JUDGE'S PERSPECTIVE

It is important to object to improper closing argument and ask the trial court to instruct the jury to disregard any improper statements the prosecutor may have made. Objection and request for admonishment are necessary prerequisites to raising any issue of prosecutorial misconduct on appeal, unless the effect of the misconduct could not be cured by admonition. People v Green (1980) 27 C3d 1, 27, 164 CR 1, overruled on other grounds in People v Martinez (1999) 20 C4th 225, 241, 83 CR2d 533.

BE PREPARED TO OBJECT TO PROSECUTOR'S REBUTTAL

- a. Make appropriate objections to improper remarks by prosecutor (see above); AND
- b. If prosecutor introduces a new argument or goes beyond your closing:
 - (1) Object; and
 - (2) Ask for a chance to rebut prosecutor's new arguments.

NOTE

Sandbagging, *i.e.*, introducing a new argument in rebuttal, when you have no chance to respond, is unethical and unfair. A judge who is truly concerned with giving your client a fair trial will prevent prosecutor from playing this game.

Further Research: See Crim Law §30.31.

JUDGE'S PERSPECTIVE

Do not rely on being given another opportunity to argue before the jury; object and prevent improper argument during rebuttal, *e.g.*, if the prosecution brings up a new argument.

The judge may allow you another chance to argue if it appears necessary in order to have a fair trial. However, because the prosecution has the burden of proof, the judge may also grant further argument to the prosecution.

Further Research: See 5 Witkin & Epstein, California Criminal Law, Criminal Trial, §§570-599 (3d ed 2000), for discussion of prosecutorial misconduct during argument.

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STEP 51. PREPARE AND GIVE YOUR FINAL ARGUMENT

OBJECTIVE

In final argument:

- a. Establish or emphasize the theme of the case;
- b. Explain the law and how the evidence weaves into the law; and
- c. *Plead with, beg, and compel* the jurors to do what's right for your client, because it is the last time you get to talk to the jury.

EFFECT OF PROPER FINAL ARGUMENT

If you do your job properly, you will *see* that the jurors understand the defense when you:

- a. Tie the facts together; and
- b. Apply the law to the facts.

USE OPPORTUNITY TO TALK TO JURY

Final argument is the *last* time that you get to talk directly to the jurors about your case, so use this precious opportunity to the best of your ability.

MAKE SURE YOU ARE ORGANIZED

Although organization will vary, generally have an interesting and organized presentation for the jury with a:

- a. Beginning, *e.g.*, tell them what you are going to tell them;
- b. Middle, *e.g.*, tell them; and
- c. End, *e.g.*, tell them what you've told them.

REVIEW RULES FOR FINAL ARGUMENTS

Do not make improper remarks to the jury, *e.g.*, misstate law or facts. See [step 50](#), above.

USE VISUAL AIDS

A good way to organize your argument is to use physical evidence and charts as a focus for your discussion:

- a. Jurors like visual aids; and
- b. Visual aids assist you in explaining difficult fact patterns and concepts of law.

JUDGE'S PERSPECTIVE

Check the readability of your charts and other demonstrative aids by viewing them from the same distance that the jurors will be viewing them.

Decide whether you will need special equipment or supplies in the courtroom, *e.g.*, audio-visual equipment, easels, chart paper, tape, tacks, colored marking pens, tape measure, and rulers. Most courts do not provide materials for this purpose.

EXPLAIN LAW

Find interesting ways to explain:

- a. Elements of the law;
- b. Burden of proof; and
- c. Presumption of innocence.

NOTE

Everyone has a favorite story or phrase to make the jury understand these concepts, *e.g.*, "decide whether the prosecutor has met her burden of proof by considering this case as if your child were charged with the offense."

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Source: Criminal Law/Defending Your Client in a Misdemeanor Case (Including a DUI) (Action Guide)/Before and During Jury Trial/STEP 52. RECEIVE THE JURY VERDICT

STEP 52. RECEIVE THE JURY VERDICT

DEFENDANT NEED NOT BE PRESENT

Recognize that there is no requirement for defendant to be present at the time the jury delivers the verdict. See [Pen C §§977\(a\), 1148](#).

CONSIDER POLLING THE JURY

a. After the jury gives the verdict (see [Pen C §1149](#)), you or the prosecutor may request that the jury be polled, *i.e.*, that each juror be asked if verdict given was his or hers (see [Pen C §§1149, 1163; Crim Law §33.34](#)):

- (1) Each juror must answer yes; or
- (2) If each juror does not answer yes, the jury must be sent out for further deliberation.

b. Generally, you will want to poll jurors after a guilty verdict, to make sure that the verdict is unanimous.

IF VERDICT IS NOT GUILTY

JUDGE ENTERS ACQUITTAL

Judge must immediately enter acquittal. [Pen C §1165](#).

DEFENDANT RELEASED

In-custody defendant must be released, unless being held on another charge. [Pen C §1165](#).

COURT EXONERATES BAIL

Court exonerates bail, and defendant obtains a refund of collateral or cash. [Pen C §1303](#); see [step 9](#), above.

IF VERDICT IS GUILTY

JUDGE DETERMINES DEFENDANT'S CUSTODY STATUS

Court ([Pen C §1166](#)):

- a. Remands defendant to sheriff;
- b. Allows defendant to remain out of custody on his or her own recognizance (O.R.) (see [step 8](#), above); or
- c. Releases defendant on bail, pending sentencing. See [step 54](#), below.

COURT CONDUCTS SENTENCING HEARING

Judge must conduct sentencing within time requirements. See [step 53](#), below.

DECIDE WHETHER TO MAKE MOTIONS

You must determine whether to make any postverdict motions. See [step 55](#), below.

Source: Criminal Law/Defending Your Client in a Misdemeanor Case (Including a DUI) (Action Guide)/Following a Guilty Verdict/STEP 53. DECIDE WHETHER CLIENT WILL WAIVE TIME FOR SENTENCING HEARING

Following a Guilty Verdict

STEP 53. DECIDE WHETHER CLIENT WILL WAIVE TIME FOR SENTENCING HEARING

TIME FOR SENTENCING

DEADLINE TO PRONOUNCE SENTENCE

Following a guilty verdict, or if defendant pleads guilty, the judge will set a time for sentencing that is (Pen C §1449):

- a. Not less than 6 hours after the verdict; and
- b. Not more than 5 days after the verdict.

Exceptions

a. Judge may extend the time for sentencing:

- (1) 10 days to determine a motion for a new trial;
- (2) 20 judicial days for consideration of probation; or
- (3) An additional 90 days if requested by:

- (a) Defendant; or
- (b) Probation officer; and

b. Defendant may waive the above time limits to *either*:

- (1) Speed up the time for sentencing, *e.g.*, client does not want to wait 6 hours; or
- (2) Delay sentencing, *e.g.*, client may request an additional 90 days to postpone sentencing. Pen C §1449. See Appendix D.

WAIVING TIME FOR SENTENCING

CONSIDER WAIVING TIME

Normally, judge will ask you whether defendant waives time for sentencing. Decide this based on whether your client wishes to:

- a. Be sentenced immediately, *e.g.*, when the client entered into a plea bargain and does not want to have to appear at a future court date for sentencing; or
- b. Delay sentencing for good cause (see Pen C §§1200, 1201), *e.g.*, if you want to bring a motion in arrest of judgment or motion for a new trial, or request a probation report. See motions discussed in step 55, below.

AT SENTENCING HEARING

At defendant's sentencing hearing, the court will ask if there is any reason why judgment should not be pronounced. Pen C §1200.

Ask for Delay

If you need more time for a postverdict motion, indicate that you have good cause to offer, *e.g.*, a motion for (Pen C §1201):

- a. New trial; or
- b. Arrest of judgment. See step 55, below.

JUDGE'S PERSPECTIVE

When a defendant is ready to be sentenced, most attorneys respond to the court's questions by stating that the client *waives* formal arraignment for judgment and sentence; and that there is *no* legal cause why judgment should not be pronounced.

Further Research: See Crim Law §§35.3-35.10, 36.3.

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Source: Criminal Law/Defending Your Client in a Misdemeanor Case (Including a DUI) (Action Guide)/Following a Guilty Verdict/STEP 54. REQUEST BAIL PENDING SENTENCE

STEP 54. REQUEST BAIL PENDING SENTENCE

RECOGNIZE WHEN DEFENDANT ENTITLED TO BAIL IN MISDEMEANOR CASE

When setting the sentencing date in a misdemeanor case, the judge must, as a matter of right, release defendant on bail if you apply for probation. Pen C §1272(1), (2).

REQUEST BAIL

Orally ask court to release defendant on bail pending sentencing whenever you apply for probation.

Further Research: See Pen C §1272.

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Source: Criminal Law/Defending Your Client in a Misdemeanor Case (Including a DUI) (Action Guide)/Following a Guilty Verdict/STEP 55. DETERMINE WHETHER TO MAKE POSTVERDICT MOTIONS

STEP 55. DETERMINE WHETHER TO MAKE POSTVERDICT MOTIONS

RESEARCH LEGAL ISSUES

Research issues that might allow court to set aside the verdict, *e.g.*, should you move for a new trial, or in arrest of judgment? See motions discussed below. See also Crim Law, chaps 33-34.

MOTION FOR NEW TRIAL

PURPOSE OF MOTION

Motion for a new trial is a request to begin again, as if no trial had occurred. Pen C §1180.

WHEN APPROPRIATE

Motion for new trial is appropriate when:

Defendant Absent

Defendant was absent from trial and the trial should not have proceeded in his or her absence (Pen C §1181(1)).

JUDGE'S PERSPECTIVE

In a misdemeanor case, defendant may waive his or her right to personally appear. Pen C §977(a). See step 12, above.

If you make a motion for new trial based on defendant's absence, the court will deny the motion if it was lawful for the trial to proceed without defendant (Pen C §1181(1)), *e.g.*:

- a. If your client knowingly and intelligently waived personal appearance, and you were authorized to proceed in your client's absence;
- b. Any other circumstances listed in the annotations of Pen C §§977, 1181.

Jury Conduct

Jury:

- a. Received evidence from outside the courtroom (other than jury view (see Pen C §1119)) (Pen C §1181(2));
- b. Engaged in misconduct that deprived the defendant of a fair trial without jury giving due consideration to the case (Pen C §1181(3)); or
- c. Decided verdict by lot or other means that deprived the defendant of a fair expression of opinion by each of the jurors (Pen C §1181(4)).

Court or Prosecutor Error

- a. Court has misdirected the jury, or made an error of law (Pen C §1181(5)).
- b. Court fails to pronounce judgment within the statutory deadline (see step 53, above; Pen C §§1191, 1202).
- c. Court refuses to hear your client's motion for new trial (Pen C §1202).
- d. Court neglects to rule on a motion for new trial before either (Pen C §1202):

- (1) Pronouncing judgment; or

(2) Making an order granting probation.

e. Prosecutor has engaged in prejudicial misconduct (Pen C §1181(5)).

Legal Error

Verdict is contrary to law or evidence (Pen C §1181(6)-(7)).

JUDGE'S PERSPECTIVE

The court may grant the motion for new trial *or* modify the verdict, finding, or judgment, if it finds that the verdict is contrary to law or evidence.

Loss of Evidence or New Evidence

a. Reporter's notes are not available (Pen C §1181(9)).

b. You find new evidence that could not, with reasonable diligence, have been discovered and produced at the original trial (Pen C §1181(8)).

JUDGE'S PERSPECTIVE

Be sure to submit affidavit of the *witnesses* you expect to give the new evidence. The court will be concerned that you really just discovered *the evidence* (not just discovered its importance), and that the new evidence is not cumulative and is likely to make the outcome different. See People v Martinez (1984) 36 C3d 816, 821, 205 CR 852.

Other Nonstatutory Grounds

Bring a motion for new trial on nonstatutory grounds when (see People v Mayorga (1985) 171 CA3d 929, 940, 218 CR 830):

a. Error resulted in denial of defendant's right to a fair trial; AND

b. Defendant did not have an earlier opportunity to raise the issue.

JUDGE'S PERSPECTIVE

Courts grant motions for new trial on *nonstatutory* grounds based on the rationale that judges have a duty to ensure a fair trial. See, e.g., People v Fosselman (1983) 33 C3d 572, 583, 189 CR 855 (ineffective assistance of counsel); People v Stewart (1988) 202 CA3d 759, 765, 248 CR 907 (same); People v Oliver (1975) 46 CA3d 747, 120 CR 368 (judge's comment expressing disbelief in defense alibi testimony); People v Davis (1973) 31 CA3d 106, 109, 106 CR 897 (defendant deprived of testimony of material witness).

DEADLINE FOR MOTION

You must move and court must rule *before* (Pen C §1182):

a. Judgment;

b. Sentence;

c. Granting probation; or

d. Committing defendant for:

(1) Observation as a mentally disordered sex offender;

(2) Narcotics addiction; or

(3) Insanity.

JUDGE'S PERSPECTIVE

Do not forget to waive time for the court to consider the motion for new trial at the sentencing arraignment (see step 53, above) when the court asks if there is good cause not to impose judgment. See Pen C §§1200, 1201.

Further Research: On new trial motions generally, see Crim Law §§34.3-34.16.

MOTION IN ARREST OF JUDGMENT

PURPOSE OF MOTION

Motion in arrest of judgment is a request that the court not sentence the defendant on a guilty verdict. Pen C §1185.

Effect of Order

If court grants your motion, client is placed in the same position as before trial was conducted. Pen C §1187.

WHEN APPROPRIATE

Move when (Pen C §§1185-1188, 1201, 1201.5):

- a. Client was formerly acquitted, convicted, or otherwise once in jeopardy for the same offense; or
- b. Complaint was legally defective (see Pen C §1004), unless you waived the defect by failing to demur (see step 13, above, for defects that are waived if you fail to demur).

JUDGE'S PERSPECTIVE

Although it is usually up to defendant to bring the motion to arrest judgment, the court may arrest judgment on its own motion if it finds any defects in the accusatory pleading. See Pen C §1186.

DEADLINE TO MOVE

You must move and court must rule *before* judgment and sentence. Pen C §1185.

JUDGE'S PERSPECTIVE

Do not forget to waive time for the court to consider the motion to arrest judgment at the sentencing hearing (see step 53, above) when the court asks if there is good cause not to impose judgment. See Pen C §§1200, 1201.

Further Research: On motions in arrest of judgment, see Crim Law §34.19.

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Before Sentencing Hearing

STEP 56. DETERMINE MAXIMUM SENTENCE

REVIEW STATUTE

Review statute under which defendant was convicted:

If Statute Specifies Sentence

The maximum sentence for a single misdemeanor is 1 year in the county jail. Pen C §19.2.

NOTE

Recognize that court may give *consecutive* sentences for multiple misdemeanor convictions. See step 62, below.

If Statute Does Not Specify Sentence

When no sentence is stated in the statute, the judge may sentence the defendant to (Pen C §19):

- a. Up to 6 months in the county jail; or
- b. Up to a \$1000 fine; or
- c. Both a. and b.

JUDGE'S PERSPECTIVE

Some judges permit a defendant to serve time in a *city* jail instead of a county jail. Check with the city jail and other attorneys to learn whether the defendant may be sentenced to city jail and whether the city jail charges additional fees.

Further Research: On misdemeanor sentencing generally, see Crim Law, chap 36. On alternative sentencing options that may be available in misdemeanor cases, see Crim Law, chap 39. For a county-by-county guide to alternative sentencing programs, see Crim Law §39.33.

Source: Criminal Law/Defending Your Client in a Misdemeanor Case (Including a DUI) (Action Guide)/Before Sentencing Hearing/STEP 57. IF AVAILABLE, OBTAIN AND REVIEW PRESENTENCING (OR PROBATION) REPORTS

STEP 57. IF AVAILABLE, OBTAIN AND REVIEW PRESENTENCING (OR PROBATION) REPORTS

OBJECTIVE

Protect your client by obtaining a presentencing report and giving it to the court so that the judge has complete and proper information to determine the correct sentence.

WHEN AVAILABLE

When defendant is convicted of a misdemeanor, judge ordinarily *may*, but is not required to, order report after guilty verdict. Pen C §§1203(d), 1203b.

WHEN REQUIRED

If defendant is convicted of a misdemeanor that requires sex offender registration under Pen C §290, the court *must*:

- a. Refer defendant to probation department for assessment of the risk defendant poses to the community (Pen C §1203(d)); see Pen C §§290.04-290.06); and
- b. Consider results of assessment in determining appropriate sentence.

PURPOSE OF REPORT

Presentence report helps court determine:

- a. Appropriate sentence; and
- b. Whether defendant should receive probation.

CONTENTS OF REPORT

- a. Information about the defendant's:
 - (1) Background;
 - (2) Personality; and
 - (3) Alternatives for achieving rehabilitation;
- b. Information about the offense; and
- c. Recommendation concerning the appropriate sentence.

WHO RECEIVES PRESENTENCE REPORT

Probation department usually provides report copies to (see Pen C §1203(b)-(d)):

- a. Court;
- b. Prosecutor;
- c. Defense; and
- d. Court file at the time of the sentencing hearing.

ASSIST PROBATION DEPARTMENT

If court orders probation department to prepare a report:

Contact Department

Contact the probation officer who will prepare the report.

Offer Assistance

Offer to provide assistance and cooperation in obtaining information needed for the report (for contents of report, see above), *e.g.*:

- a. Suggest names and addresses of people to contact for character references concerning client, *e.g.*, employers, pastors;
- b. Discuss and suggest alternative sentences that officer might consider recommending to judge.

NOTE

Do not rely solely on the probation department to contact people who can provide references for client. Obtain letters from people who can attest to the defendant's good character and, if the probation officer does not include such references in the probation report, be prepared to offer them at the sentencing hearing.

WHEN PROBATION DEPARTMENT PRODUCES REPORT

Probation department usually makes report available to you, the court, and prosecutor (see Pen C §1203(b)(2)(D) for deadline in felony cases):

- a. 5 days before the sentencing hearing; OR
- b. If you or prosecutor request, 9 days before hearing. For objections to the probation report, see step 65, below.

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Source: Criminal Law/Defending Your Client in a Misdemeanor Case (Including a DUI) (Action Guide)/Before Sentencing Hearing/STEP 58. BE PREPARED TO ARGUE FOR PROBATION

STEP 58. BE PREPARED TO ARGUE FOR PROBATION

DISCUSS PROBATION WITH CLIENT

Review the rules for probation with client and determine whether client is willing to agree to possible conditions of probation. See [step 33](#), above.

ANALYZE FACTORS JUDGE WILL EVALUATE CONCERNING PROBATION

Be prepared to show the judge that the factors set out in [step 33](#), above, will be satisfied. See [Pen C §1202.7](#).

RESEARCH APPROPRIATE CONDITIONS

Review possible conditions and the supporting cases and statutes (see [step 33](#), above) to be prepared to:

- a. Suggest appropriate conditions on probation; and
- b. Respond to inappropriate conditions suggested by:
 - (1) Judge;
 - (2) Prosecution; or
 - (3) Probation report. See [step 57](#), above, and [step 65](#), below.

Further Research: On probation generally, see [Crim Law, chap 38](#).

STEP 59. GATHER INFORMATION CONCERNING RESTITUTION AND RESTITUTION FINE

Restitution

RESTITUTION DEFINED

- a. Restitution is a payment made by the defendant directly to the victim to compensate the victim for losses due to crime. Pen C §1202.4.
- b. Under Pen C §1202.4(f)(3), restitution includes:
 - (1) Full compensation to the victim for victim's economic losses; and
 - (2) Reimbursement for expenses victim incurred as a result of the crime. For compensable losses, see below.

KNOW WHEN COURT MUST ORDER RESTITUTION

Whenever Defendant Convicted of Crime

Unless compelling and extraordinary reasons exist to the contrary, court *must* order the defendant to pay full restitution in every case in which a crime victim suffers a loss. Cal Const art I, §28(b); Pen C §1202.4(g).

When Court Places Defendant on Probation

If court grants probation, it must:

- a. Make payment of restitution a condition of probation (Pen C §1202.4(m)); or
- b. Make community service a condition of probation, *but only* if it finds compelling and extraordinary reasons why restitution should not be required. Pen C §1202.4(n). See step 69, below, for argument against restitution.

KNOW LIMITS ON COURT'S DISCRETION

The court must state the reasons for not ordering restitution on the record (Pen C §1202.4(g)), *but* a defendant's inability to pay does not constitute:

- a. A compelling and extraordinary reason not to order restitution; or
- b. A valid consideration in fixing the amount of restitution.

NOTE

The court retains very limited discretion to grant probation without imposing either restitution or community service, but to do so, it must make an *additional* finding of compelling and extraordinary reasons why community service should not be required.

KNOW WHAT LOSSES ARE COMPENSABLE

Restitution to the victim includes full payment for losses resulting from defendant's crime (Pen C §1203(f)(3)), including:

- a. Value of stolen or damaged property measured by:
 - (1) Replacement cost; or
 - (2) Actual cost of repair;
- b. Medical expenses; and

c. Wages or profits lost due to:

- (1) Injury; or
- (2) Time spent as a witness or in assisting the prosecution.

Decide Method of Setting Restitution Amount

Decide whether you want:

- a. Judge to determine that the restitution is proper and the amount due the victim; or
- b. To agree that:
 - (1) Probation department will determine the amount and method of payment at a later date; but
 - (2) Defendant reserves the right to have judge determine matter if client and probation officer cannot agree. On amount of restitution, see below.

Gather Evidence of Amount of Restitution

Gather evidence to present at the sentencing hearing concerning the proper amount of economic loss and expenses, if any. See below.

KNOW WHEN RESTITUTION NOT APPROPRIATE

A restitution order to a victim is not appropriate when the loss is not directly related to the *client's* criminal conduct.

Example: Judge should not order restitution when your client is charged with receiving stolen property (Pen C §496), because the victim really suffered loss from the burglary (Pen C §459), not from your client receiving it afterward. See People v Scroggins (1987) 191 CA3d 502, 506, 236 CR 569.

JUDGE'S PERSPECTIVE

Your client may want to agree to pay restitution to negotiate dismissal of other counts. To order restitution "which is attributable to a count dismissed pursuant to a plea bargain," the court must obtain a waiver pursuant to People v Harvey (1979) 25 C3d 754, 159 CR 696, from your client as to the dismissed charge. Pen C §1192.3(b).

IF DEFENDANT DOES NOT PAY

Court may revoke probation when defendant fails to pay restitution, *if* it finds (Pen C §1203.2(a)):

- a. That defendant had the ability to pay; and
- b. Defendant's failure to pay the restitution was willful, *e.g.*:
 - (1) A judge *cannot* revoke probation for failure to pay a fine or restitution without determining that the defendant did *not* make a good faith effort to pay, or that alternative forms of punishment do not exist (Bearden v Georgia (1983) 461 US 660, 76 L Ed 2d 221, 103 S Ct 2064);
 - (2) Revoking probation because defendant was indigent would violate the Fourteenth Amendment (see Tate v Short (1971) 401 US 395, 28 L Ed 2d 130, 91 S Ct 668). For restitution arguments and evidence to present at the sentencing hearing, see step 69, below.

Further Research: See Pen C §§1202.4, 1203. On restitution fines, see Crim Law §38.13. On restitution, see Crim Law, chap 40.

restitution fine

DESCRIPTION

- a. The court must impose a restitution fine after every criminal conviction:

(1) Unless compelling and extraordinary reasons exist not to impose the fine; and

(2) The judge states the reasons on the record.

b. The restitution fine is to be paid to the state Restitution Fund. Pen C §1202.4(e).

AMOUNT OF FINE

The restitution fine for misdemeanor cases is set by the seriousness of the offense, but must be (Pen C §1202.4(b)(1)):

a. Not less than \$100; and

b. Not more than \$1000.

APPROPRIATE CONSIDERATIONS IN SETTING FINE

a. In determining the amount of the fine, the court may consider:

(1) The seriousness of the offense; and

(2) The defendant's ability to pay.

b. The defendant's inability to pay does not constitute a compelling and extraordinary reason for not imposing the fine.

Further Research: On restitution fines, see Crim Law §44.13.

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Source: Criminal Law/Defending Your Client in a Misdemeanor Case (Including a DUI) (Action Guide)/Before Sentencing Hearing/STEP 60. CONSIDER JAIL ALTERNATIVES

STEP 60. CONSIDER JAIL ALTERNATIVES

WORK FURLOUGH

OBJECTIVE

When a defendant is ordered to serve jail time, work furlough allows the client to retain employment and remain in jail only when not at work. Pen C §1208.

CHECK WITH LOCAL AUTHORITIES

Because a county is not required to offer a work furlough program and the admission requirements are established by the county, call sheriff or probation department to determine:

- a. Whether a work furlough program exists;
- b. Eligibility requirements, including:
 - (1) Offenses that are not eligible for furlough; and
 - (2) Minimum jail sentences defendant must receive in order to qualify for furlough; and
- c. Fees charged to participate in program.

Further Research: See Crim Law §§39.2-39.9. For a county-by-county list of alternative sentencing programs, see Crim Law §39.33.

SHERIFF'S WORK ALTERNATIVES PROGRAMS (SWAP)

OBJECTIVE

Client can reduce jail time by working in a community service program. Pen C §4024.2.

IF CLIENT IN PROGRAM

You should impress on your client the importance of regular attendance and adherence to the rules of SWAP, because unsatisfactory performance will result in a jail sentence.

CHECK ON AVAILABILITY

Because county SWAP programs are not required by statute, call the sheriff or probation department to determine:

- a. Whether this option is available in your county; and
- b. Fees the county charges to participate in program.

Further Research: See Crim Law §§39.27-39.30. For a county-by-county list of alternative sentencing programs, see Crim Law §39.33.

HOME DETENTION

OBJECTIVE

If court orders client to serve jail time, home detention allows client to remain at home, often using electronic monitoring devices, rather than be incarcerated. Pen C §1203.016. See Crim Law §39.32.

CHECK WITH LOCAL AUTHORITIES

Because a county is not required to offer a home detention program and the admission requirements are established by the county, call sheriff or probation officer to determine:

- a. Whether this option is available in your county; and
- b. Fees the county charges to participate in the program.

Further Research: See Crim Law §39.32. For a county-by-county list of alternative sentencing programs, see Crim Law §39.33.

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Source: Criminal Law/Defending Your Client in a Misdemeanor Case (Including a DUI) (Action Guide)/Before Sentencing Hearing/STEP 61. IF APPROPRIATE, ANTICIPATE MULTIPLE SENTENCES

STEP 61. IF APPROPRIATE, ANTICIPATE MULTIPLE SENTENCES

REVIEW STATUTE

If one "act or omission" is punishable under more than one statute, defendant (Pen C §654):

- a. May be punished only once; and
- b. May *not* be tried under an alternative statute if acquitted or convicted and sentenced.

JUDGE'S PERSPECTIVE

Review the extensive body of case law interpreting Pen C §654, e.g., People v Latimer (1993) 5 C4th 1203, 23 CR2d 144.

WHEN MULTIPLE SENTENCES MAY BE IMPOSED

Court may impose multiple sentences when:

- a. Defendant is convicted of more than one act or omission (see Pen C §654);
- b. A single act or omission results in harm to more than one victim (People v McFarland (1989) 47 C3d 798, 803, 254 CR 331 (separate punishment is permissible when defendant, in single incident, commits vehicular manslaughter as to one victim, and drunk driving resulting in injury to separate victim)); or
- c. Defendant engages in a single act or omission but has more than one criminal intent (In re Hayes (1969) 70 C2d 604, 75 CR 790 (defendant convicted of driving under influence and driving with suspended license could be sentenced for both crimes because each was distinct criminal act)).

NOTE

A defendant who on a single occasion commits more than one act or omission but has only a single criminal intent or objective may be punished for only one crime. See People v Latimer (1993) 5 C4th 1203, 23 CR2d 144.

JUDGE'S PERSPECTIVE

Although the language of Pen C §654 appears to refer only to prosecutions under the Penal Code, case law has extended it to the penal provisions of other statutes. People v Djekich (1991) 229 CA3d 1213, 1220, 280 CR 824 (municipal zoning ordinance); People v Smith (1984) 155 CA3d 1103, 1153, 203 CR 196, disapproved on other grounds in Baluyut v Superior Court (1996) 12 C4th 826, 835, 50 CR2d 1 (false filing of tax return in violation of Revenue and Taxation Code).

WHEN ONE SENTENCE APPROPRIATE

Court must determine from the facts of the case whether defendant had *one* primary objective (other objectives are merely incidental), and there should be only one punishment, even though defendant is convicted of more than one crime.

DUI

A defendant:

- a. MAY be convicted of driving under the influence (Veh C §§23152(a), 23153(a)) and of driving with a blood alcohol level of .08 percent or more (Veh C §§23152(a), 23153(a)), BUT *may not be sentenced* under both provisions. People v Subramani (1985) 173 CA3d 1106, 1110, 219 CR 644.
- b. MAY be convicted of *driving* under the influence of a controlled substance (Veh C §23152(a)) and of *being* under the influence of a controlled substance (Health & S C §11550(a)), AND may be sentenced on both offenses. People v Davalos (1987) 192 CA3d Supp 10, 14, 238 CR 50.
- c. MAY NOT be charged with, convicted of, or sentenced on more than one count of causing physical injury while driving

under the influence or with a blood alcohol level of .08 or greater (Veh C §23153(a), (b)). Wilkoff v Superior Court (1985) 38 C3d 345, 211 CR 742.

JUDGE'S PERSPECTIVE

Although violation of Veh C §23153(a) or (b) is often called "felony drunk driving," it is actually a wobbler. See step 3, above. When a defendant is convicted of a *felony* violation of Veh C §23153(a) or (b), and the incident involved injury to more than one person, the court must ordinarily impose a 1-year sentence enhancement for each additional victim, up to a maximum of 3 years. Veh C §23558.

PREPARE ARGUMENT FOR ONE SENTENCE

In appropriate case, prepare to argue applicability of Pen C §654 at sentencing hearing. See step 6Z, below.

Further Research: See Crim Law §§37.44-37.50.

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Source: Criminal Law/Defending Your Client in a Misdemeanor Case (Including a DUI) (Action Guide)/Before Sentencing Hearing/STEP 62. IF APPLICABLE, ANTICIPATE CONSECUTIVE SENTENCES

STEP 62. IF APPLICABLE, ANTICIPATE CONSECUTIVE SENTENCES

WHEN APPLICABLE

Defendant is convicted of and receives sentences for more than one crime.

ASSUME CONCURRENT SENTENCES

If judge does not state either concurrent or consecutive sentences, the law presumes the sentences to be concurrent. Pen C §669; see In re Alstatt (1964) 227 CA2d 305, 307, 38 CR 616.

REVIEW CONSECUTIVE SENTENCING RULES

Judge can impose full terms consecutively without limit (limit of Pen C §1170.1 applies only to felonies). See People v Murray (1994) 23 CA4th 1783, 1789, 29 CR2d 42; People v Hartfield (1981) 117 CA3d 504, 508, 172 CR 794.

WHEN CONSECUTIVE SENTENCES IMPROPER

Judge may not impose consecutive sentences because the defendant exercised the right to a jury trial. In re Lewallen (1979) 23 C3d 274, 278, 152 CR 528.

WHEN CONSECUTIVE SENTENCES PROPER

It is not an abuse of discretion for the judge to order consecutive sentences when a defendant refuses a warrantless search condition in a probationary sentence offer. People v Giminez (1975) 14 C3d 68, 120 CR 577.

Further Research: See Crim Law §§36.18-36.21; see step 68, below.

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At Sentencing Hearing

STEP 63. ATTEND SENTENCING HEARING

OBJECTIVE

Judge will pronounce judgment at a sentencing hearing (or "arraignment"). Pen C §1200.

OBJECT TO HEARING JUDGE

If a different judge is assigned to hear the sentencing hearing, consider demanding that the trial judge conduct the sentencing hearing, because trial judge is already familiar with any mitigating evidence presented at trial, and you will not need to repeat that evidence.

JUDGE'S PERSPECTIVE

If your client entered a plea before a judge who retained sentencing discretion:

a. Client usually has a right to have the same judge impose the sentence (see People v Arbuckle (1978) 22 C3d 749, 150 CR 778); UNLESS

b. You waive this right (an "Arbuckle" waiver) by:

- (1) Failing to object to the new judge;
- (2) Expressly accepting the new judge.

See People v Adams (1990) 224 CA3d 1540, 1544, 274 CR 629, and cases cited therein. see also Crim Law §35.11. See also step 66, below.

Source: Criminal Law/Defending Your Client in a Misdemeanor Case (Including a DUI) (Action Guide)/At Sentencing Hearing/STEP 64. PRESERVE SENTENCING ISSUES FOR APPEAL

STEP 64. PRESERVE SENTENCING ISSUES FOR APPEAL

OBJECT TO IMPROPER INFORMATION

At the sentencing hearing, object to improperly presented or considered information, in order to preserve issues for appeal, *e.g.*:

- a. Challenge improper information on which a sentence is based (see Pen C §§1203-1204);
- b. Object to improper contents of the probation report at the sentence hearing (see step 57, above, and step 65, below, for contents of presentence report); and
- c. Object to inaccurate calculation of custody credits. See People v Garcia (1987) 195 CA3d 191, 197, 240 CR 703; see step 70, below.

EFFECT OF FAILURE TO OBJECT

You waive the issue on appeal if you fail to:

- a. Challenge inaccurate facts; or
- b. Object to facts improperly before the judge.

NOTE

Ordinarily, the failure to object to probation conditions results in forfeiture of the right to challenge the conditions on appeal. People v Welch (1993) 5 C4th 228, 19 CR2d 520. The failure to object to a condition of probation that is unconstitutional on its face does not forfeit the right to appeal the condition. In re Sheena K. (2007) 40 C4th 875, 878, 55 CR3d 716.

Further Research: See People v Garcia (1987) 195 CA3d 191, 197, 240 CR 703; Crim Law §§35.17-35.21.

Source: Criminal Law/Defending Your Client in a Misdemeanor Case (Including a DUI) (Action Guide)/At Sentencing Hearing/STEP 65. RESPOND TO PRESENTENCE REPORT AT HEARING

STEP 65. RESPOND TO PRESENTENCE REPORT AT HEARING

OBJECT TO INFORMATION IN PRESENTENCE REPORT

At the sentencing hearing, object to improper information in the presentence report (also called the probation report) to preserve the issue for appeal (*People v Medina* (1978) 78 CA3d 1000, 144 CR 581), *e.g.*, the judge may *not*:

- a. Use evidence that was suppressed at trial but may be included in presentence report (see *People v Belleci* (1979) 24 C3d 879, 157 CR 503);
- b. Base a sentence on charges on which defendant was acquitted (*People v Takencareof* (1981) 119 CA3d 492, 174 CR 112);
- c. Rely on fact that defendant has been detained by the police or arrested, unless the court investigates the supporting facts (*People v Tobia* (1979) 98 CA3d 157, 159 CR 376); or
- d. Punish a defendant for exercising the constitutional right to a jury trial by, *e.g.*, giving defendant a long sentence because he or she rejected a pretrial offer. See *In re Lewallen* (1979) 23 C3d 274, 152 CR 528.

ASK COURT TO STRIKE PRESENTENCE REPORT

Ask judge to strike portions of (or whole) report that are:

- a. Improper;
- b. Unsupported by facts; or
- c. Inaccurate.

PRESENT EVIDENCE TO REBUT PRESENTENCE REPORT

You have the right to supplement or rebut information in the presentence report (see *People v Chi Ko Wong* (1976) 18 C3d 698, 725, 135 CR 392) by:

- a. Presenting evidence; or
- b. Preparing and filing your own report. Pen C §1204. See step 5Z, above.

Include in Report

The defense report should include, as appropriate:

- a. Alternative sentencing plan;
- b. Facts about the defendant's background or personality that help to explain the criminal behavior; and
- c. Alternative methods for changing the defendant's behavior, *e.g.*:
 - (1) Counseling;
 - (2) Job training; or
 - (3) Education.

JUDGE'S PERSPECTIVE

If you submit a report, expect the judge to give the prosecution or probation officer an opportunity to:

- a. Reply to your report; or

b. Evaluate any rehabilitation program you suggest. See Pen C §1204.

PRESENT EVIDENCE OF MITIGATING CIRCUMSTANCES

In addition to filing a defense report, you have the right to present actual evidence at the sentencing hearing. Pen C §1204; *People v Gelfuso* (1971) 16 CA3d 966, 972, 94 CR 535.

Further Research: See *People v Municipal Court (Lopez)* (1981) 116 CA3d 456, 172 CR 140. On the probation report, see step 57, above.

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Source: Criminal Law/Defending Your Client in a Misdemeanor Case (Including a DUI) (Action Guide)/At Sentencing Hearing/STEP 66. IF APPLICABLE, RECOGNIZE EFFECT OF NEGOTIATED DISPOSITIONS

STEP 66. IF APPLICABLE, RECOGNIZE EFFECT OF NEGOTIATED DISPOSITIONS

WHEN APPLICABLE

If you have negotiated a disposition of the charge and entered a guilty plea, consider effect on sentencing. See [step 33](#), above.

JUDGE IMPOSES NEGOTIATED SENTENCE

Generally, judge imposes the sentence consistent with the terms of the negotiation. But under certain circumstances, judge can revoke agreement. See [Pen C §1192.5](#) and discussion below.

NO MODIFICATION OF NEGOTIATED SENTENCE

Terms of the disposition may not be increased or decreased without the *consent* of the client, the prosecutor, *and* the judge ([Pen C §1192.5](#)), *i.e.*:

Client Cannot Change Plea

If client wants to change plea *before judgment*, recognize that:

- a. You must make an application to change the plea and show *good cause, i.e.*, substantial legal reasons for withdrawing the guilty plea (*e.g.*, the client has been misled by you, or the client was incompetent at the time of the plea) (see [Crim Law §26.21](#)); and
- b. If plea is withdrawn, the charges against your client, including any dismissed under a negotiated plea, are reinstated. See [People v Superior Court \(Garcia\) \(1982\) 131 CA3d 256, 258, 182 CR 426](#).

Judge Cannot Increase Sentence

Judge cannot *increase* the negotiated sentence. For discussion of when judge can revoke agreement, see below.

JUDGE'S PERSPECTIVE

If your client entered a plea before a judge who retained sentencing discretion, remember to ask for same judge to impose the sentence. See [step 63](#), above.

JUDGE CAN REVOKE THE AGREEMENT

At the time of sentencing, the judge may ([Pen C §1192.5](#)):

- a. Withdraw approval of the settlement; and
- b. Allow the defendant to then enter a plea, *e.g.*, not guilty.

When Appropriate

Withdrawal of approval is appropriate when judge has given further consideration to the matter, *e.g.*, judge discovers that:

- a. Facts of the case are much more serious than judge earlier believed; or
- b. Client's record is worse than judge understood.

WHEN TO ACCEPT A MODIFIED AGREEMENT

While the judge cannot increase the proposed sentence without client's consent, client may be better off accepting an increased sentence rather than facing a trial with a more difficult fact situation to overcome (*e.g.*, judge discovers unfavorable facts).

Further Research: On pleas and settlement generally, see [Crim Law, chap 26](#).

Source: Criminal Law/Defending Your Client in a Misdemeanor Case (Including a DUI) (Action Guide)/At Sentencing Hearing/STEP 67. IF APPROPRIATE, OBJECT TO MULTIPLE SENTENCES

STEP 67. IF APPROPRIATE, OBJECT TO MULTIPLE SENTENCES

WHEN TO OBJECT

Argue against multiple sentences when defendant is convicted of more than one crime, but had only *one* primary objective. See Pen C §654; see also step 61, above.

JUDGE MUST SENTENCE ON OFFENSE THAT PROVIDES LONGEST POTENTIAL SENTENCE

The judge must sentence the defendant on the offense that provides for the longest potential term of imprisonment. Pen C §654(a).

NOTE

Penal Code §654 places no statutory limitation on the trial court's sentencing discretion within the range available for that offense. See People v Kramer (2002) 29 C4th 720, 724, 128 CR2d 407.

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Source: Criminal Law/Defending Your Client in a Misdemeanor Case (Including a DUI) (Action Guide)/At Sentencing Hearing/STEP 68. ARGUE AGAINST CONSECUTIVE SENTENCES

STEP 68. ARGUE AGAINST CONSECUTIVE SENTENCES

OBJECT TO CONSECUTIVE SENTENCE

Argue against consecutive sentences on grounds that:

- a. Consecutive sentences are cruel and unusual punishment (see *People v Haendiges* (1983) 142 CA3d Supp 9, 18, 191 CR 785 (court did not overturn sentence on this basis)); and
- b. Judge should not impose consecutive sentences to punish defendant for exercising the right to a jury trial. *In re Lewallen* (1979) 23 C3d 274, 278, 152 CR 528.

OBJECT TO TERM OF SENTENCE

Argue that consecutive "wobbler" sentences (see steps 3 and 62, above) should be limited to the maximum sentence defendant could receive as a felon defendant (see *People v Powell* (1985) 166 CA3d Supp 12, 23, 212 CR 454 (applying Pen C §1170.1); but see *In re Valenti* (1986) 178 CA3d 470, 476, 224 CR 10 (Pen C §1170.1 does not apply in misdemeanor cases)). See step 62, above. See also Crim Law §§36.18-36.21.

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Source: Criminal Law/Defending Your Client in a Misdemeanor Case (Including a DUI) (Action Guide)/At Sentencing Hearing/STEP 69. PRESENT EVIDENCE CONCERNING RESTITUTION

STEP 69. PRESENT EVIDENCE CONCERNING RESTITUTION

ASK JUDGE TO DETERMINE RESTITUTION

- a. The defendant has the right to a hearing before a judge to dispute the amount of restitution. Pen C §1202.4(f)(1). See *In re Brittany L.* (2002) 99 CA4th 1381, 1390, 122 CR2d 376 (construing "virtually identical" juvenile court restitution provision).
- b. The amount must be established by a preponderance of the evidence (see *People v Baumann* (1985) 176 CA3d 67, 80, 222 CR 32).

For discussion of restitution, see step 59, above.

PRESENT EVIDENCE CONCERNING RESTITUTION

In appropriate circumstances:

- a. Present evidence of compelling and extraordinary reasons why full restitution should not be ordered (see Pen C §1202.4(g)), *e.g.*, client is terminally ill.

NOTE

A defendant's inability to pay is not a compelling and extraordinary reason not to impose a restitution order and cannot be considered in determining the amount of restitution. Pen C §1202.4(g). If client fails to pay fine, you can argue the client's inability to pay at motion to revoke probation. See step 59, above.

- b. Present evidence that amount of full restitution is less than amount stated in probation report or claimed by victim.

Source: Criminal Law/Defending Your Client in a Misdemeanor Case (Including a DUI) (Action Guide)/At Sentencing Hearing/STEP 70. MAKE SURE CLIENT RECEIVES CUSTODY AND CONDUCT CREDITS

STEP 70. MAKE SURE CLIENT RECEIVES CUSTODY AND CONDUCT CREDITS

OBJECTIVE

Make sure defendant gets credit against his or her sentence for days spent "in custody":

TYPES OF CREDIT

- a. Under Pen C §2900.5(a), an individual is entitled to have one day of credit subtracted from any jail sentence for each day of presentence custody attributable to the offense of conviction.
- b. Under Pen C §4019, an individual may also be entitled to have conduct credits and work credits (often called "good time-work time" credits) subtracted from the sentence.

KNOW WHAT RESTRICTIONS ON LIBERTY QUALIFY AS CUSTODY

The following are examples of places where time is spent in custody:

- a. Jail;
- b. Hospital;
- c. Work program;
- d. Treatment facility; or
- e. Home detention. See People v Lapaille (1993) 15 CA4th 1159, 19 CR2d 390 (custody credit—but no conduct credit—for preconviction house arrest).

NOTE

See Pen C §2900.5 for other institutions that are considered custodial.

CUSTODY CREDIT

REQUEST CUSTODY CREDIT AGAINST FINE

If the judge intends to fine defendant, and not impose county jail time, argue that defendant is entitled to a minimum of \$30 credit for each day spent in custody. Pen C §§1205, 2900.5(a).

HOW TO CALCULATE CUSTODY CREDIT

Request that the court award credits against the sentence for each day in custody, up to and including the day of sentencing. See People v Bravo (1990) 219 CA3d 729, 735, 268 CR 486.

Minimum

A defendant is entitled to one day's credit for any partial day spent in jail. See In re Jackson (1986) 182 CA3d 439, 442, 227 CR 303; People v Bravo (1990) 219 CA3d 729, 735, 268 CR 486.

JUDGE'S PERSPECTIVE

Make sure you show that the presentence custody was attributable to proceedings related to the same conduct for which the defendant has been convicted. See Pen C §2900.5(b). See below.

When Begins

Custody credit begins the moment defendant is arrested, regardless of the state or county of the arrest. See In re Allen (1980) 105 CA3d 310, 313, 164 CR 319.

Example: If defendant is arrested in Marin County and is detained there for 3 days before being transported to San Francisco, defendant is generally entitled to 3 days' custody credit against the case prosecuted in San Francisco.

EXCEPTION

A defendant is *not* entitled to presentence custody credits for time incarcerated for another offense. Pen C §2900.5(b).

CONDUCT CREDIT

WHEN APPLICABLE

When defendant receives a sentence of imprisonment (or fine and imprisonment) of 6 days or more, *deduct* from the sentence the time spent in custody during which defendant satisfactorily (Pen C §4019):

- a. Performed assigned labor; and
- b. Complied with rules and regulations of the facility.

HOW TO CALCULATE CONDUCT CREDIT

a. Under Pen C §4019(f), for every 4 days satisfactorily served, defendant receives 6 days of credit, *i.e.*:

- (1) Four days of custody credit; plus
- (2) Two days of conduct credit.

b. To calculate the conduct credit:

- (1) Divide actual days in custody by 4;
- (2) Drop the remainder, if any; and
- (3) Multiply that number by 2.

Example: Defendant served 158 days in actual custody. 158 divided by 4 equals 39 with a remainder of 2. Drop the remainder. Multiply 39 by 2. Defendant receives 78 days of conduct credit. See People v Bravo (1990) 219 CA3d 729, 735, 268 CR 486 (remainder is dropped because Pen C §4019 awards credits in 4-day increments).

Further Research: On calculating credits, see In re Marquez (2003) 30 C4th 14, 25, 131 CR2d 911; People v Bravo (1990) 219 CA3d 729, 732, 268 CR 486; People v Smith (1989) 211 CA3d 523, 527, 259 CR 515. See also Crim Law §§36.7-36.8, 37.54-37.60.

Source: Criminal Law/Defending Your Client in a Misdemeanor Case (Including a DUI) (Action Guide)/At Sentencing Hearing/STEP 71. ASK COURT TO CONTINUE CLIENT ON O.R. OR SET BAIL ON APPEAL

STEP 71. ASK COURT TO CONTINUE CLIENT ON O.R. OR SET BAIL ON APPEAL

CLIENT ENTITLED TO BAIL

- a. If court imposes a jail sentence, your client is entitled to bail pending any appeal. Pen C §1272(1), (2).
- b. Pending appeal, orally ask court to:
 - (1) Continue defendant on O.R. (see step 8, above); or
 - (2) Set bail.

Further Research: See Pen C §1272.

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After Sentencing

STEP 72. ADVISE CLIENT TO REGISTER IF CONVICTED OF SEX OFFENSE

WHO MUST REGISTER

Client must register if convicted of misdemeanor offenses listed in Pen C §290, *e.g.*:

- a. Procuring (Pen C §266);
- b. Lewd or lascivious conduct (Pen C §272);
- c. Indecent exposure (Pen C §314(1), (2)); and
- d. Annoying or molesting a child (Pen C §647.6).

WHAT REQUIRED

Client:

- a. Must register (Pen C §290(a)):
 - (1) With chief of police;
 - (2) With county sheriff, if living in:
 - (a) Unincorporated area; or
 - (b) City with no police department;
 - (3) With campus police chief, if living on campus or in campus facility of:
 - (a) University of California;
 - (b) California State University; or
 - (c) Community college;
 - (4) Within 5 working days of coming into a new jurisdiction;
 - (5) Within 5 days of changing his or her residence within any jurisdiction; or
 - (6) If transient, *i.e.*, has no residence, in the jurisdiction where he or she is "physically present" within 5 days of being released from custody; and
- b. Must update registration each year:
 - (1) Within 5 working days of birthday; and
 - (2) If transient, every 30 days.

EXPLAIN PENALTY FOR FAILURE TO REGISTER

Advise client that, when the conviction requiring registration is a misdemeanor, willful failure to comply with any provision of the registration statute is a misdemeanor punishable by one year in the county jail. Pen C §290(g)(1).

Source: Criminal Law/Defending Your Client in a Misdemeanor Case (Including a DUI) (Action Guide)/After Sentencing/STEP 73. DEMAND THAT OTHER PENDING CASES BE RESOLVED UNDER PEN C §1381

STEP 73. DEMAND THAT OTHER PENDING CASES BE RESOLVED UNDER PEN C §1381

WHEN APPLICABLE

Demand resolution of other pending cases when (Pen C §1381):

- a. Client is already serving a sentence of *more than* 90 days; and
- b. At the time imprisonment began, there was pending against the client:
 - (1) Indictment;
 - (2) Information;
 - (3) Complaint; or
 - (4) Any criminal proceeding in which client has not been sentenced.

WHAT CLIENT MAY DEMAND

Defendant may demand that prosecutor resolve pending cases within **90** days after serving the demand on the prosecutor. Pen C §1381.

How Resolved

Prosecutor may resolve the case by:

- a. Bringing case to trial; or
- b. Sentencing defendant.

When Deadline Begins

90-day limit begins the day the demand is received by prosecutor. Pen C §1381.

EFFECT OF DEMAND

- a. If prosecutor is unable to resolve case within **90** days, pending charges will be *dismissed*. Pen C §1381.
- b. Defendant is also entitled to custody credits against any future sentence from the date the demand is received. On custody credits, see step 70, above.

NOTE

This dismissal bars any other prosecution for the same offense if it is a misdemeanor not charged together with a felony. Pen C §1387(a).

ADVISE CLIENT OF ASSISTANCE AVAILABLE TO PREPARE DEMAND

- a. Determine whether jail facilities where client is located have:
 - (1) Jail legal service groups, or jail counselors; and/or
 - (2) Special demand forms;
- b. Advise client that he or she may rely on legal services/counselors, if available, to:
 - (1) Complete demand; and

(2) Make sure that the proper certifications are included with the demand; and

c. Demand must be signed by the sheriff, custodian, or jailer of the facility where client is serving sentence. Pen C §1381.

FILE WITH PROSECUTOR

Be available to help file the demand with *prosecutor* of county where charges are pending. See Pen C §1381.

DEMAND INEFFECTIVE IF PROCEDURES NOT FOLLOWED

Strict compliance with the conditions of Pen C §1381 is required for the demand to be effective. People v Gutierrez (1994) 30 CA4th 105, 111, 35 CR2d 526. A demand will be invalid and without effect if, for example:

Incomplete

The forms are not completed and signed by the warden. See Smith v Superior Court (1984) 159 CA3d 1172, 1177, 206 CR 282 (concurring opinion of Panelli, J.).

Misfiling

The demand is not filed with prosecutor's office. See People v Gutierrez (1994) 30 CA4th 105, 111, 35 CR2d 526.

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Source: Criminal Law/Defending Your Client in a Misdemeanor Case (Including a DUI) (Action Guide)/After Sentencing/STEP 74. ASK COURT TO DISMISS VEHICLE CODE VIOLATIONS

STEP 74. ASK COURT TO DISMISS VEHICLE CODE VIOLATIONS

WHEN AVAILABLE

When client is sentenced to incarceration in a youth authority or state prison facility, he or she is entitled to a dismissal of all pending motor vehicle or pedestrian violations. Veh C §41500.

WHEN NOT AVAILABLE

Dismissal is not available if:

- a. Client is incarcerated in state prison because of violating parole (Veh C §41500(e));
- b. Vehicle violation requires DMV to revoke license (Veh C §41500(d)), *e.g.*, when pending violation is a second drunk driving conviction within 10 years, it will not be dismissed because DMV must revoke client's driving privileges under Veh C §23540 (see People v Minor (1988) 204 CA3d Supp 5, 251 CR 636); or
- c. The pending offense is a violation of Veh C §23103, §23152, or §23153. Veh C §41500(f).

REQUEST DISMISSAL

When client is sentenced to state prison, ask the court in which the Vehicle Code charges are pending to dismiss the charges.

Source: Criminal Law/Defending Your Client in a Misdemeanor Case (Including a DUI) (Action Guide)/APPENDIX A
Pretrial Motion Checklist

APPENDIX A
Pretrial Motion Checklist

See [steps 36-39](#), concerning pretrial motions generally, including the judge's perspective concerning those motions.

- If client is in custody at arraignment, do you want a probable cause hearing? Demand a **Pen C §991 hearing**. See [step 13](#). See also [Crim Law, chap 6](#).
- Do you need additional discovery? File a formal **discovery motion**. See [step 28](#) and [Crim Law, chap 11](#).
- Is the client charged with violating [Pen C §148](#) or [§243](#), or will the credibility of police officers be in question? File a **Pitchess motion**. See [step 27](#) and [Crim Law, chap 11](#).
- Was your client arrested as a result of information supplied by a confidential informant, and is that informant material to guilt or innocence? File an **informant disclosure motion**. See [step 36](#) and [Crim Law, chap 17](#).
- Will you need an expert to test evidence, examine the client, or give an opinion? File a **motion for appointment of expert**. See [step 30](#) and [Crim Law, chap 18](#).
- Is your client being prosecuted because client is a member of a cognizable minority group? File a **Murgia motion**. See [step 36](#) and [Crim Law, chaps 11, 18](#).
- Is prosecutor motivated by vindictiveness? File a **motion to dismiss for vindictive prosecution**. See [step 36](#) and [Crim Law, chap 18](#).
- Does any member of the DA's office have a conflict of interest with your case? File a **recusal motion**. See [Crim Law, chap 18](#).
- Was evidence seized as a result of an invasion of your client's rights under US Const amend IV? File a **motion to suppress evidence under Pen C §1538.5**. See [step 36](#) and [Crim Law, chap 16](#).
- Was there a delay in bringing the charges against the client? File a **speedy trial motion**. See [Crim Law, chap 19](#).
- Are prior convictions alleged against the client? File a **motion to strike priors**. See [Crim Law, chaps 24, 55](#).

File a **motion to bifurcate jury trial on proof of prior convictions**. See [Crim Law, chap 24](#).

Source: Criminal Law/Defending Your Client in a Misdemeanor Case (Including a DUI) (Action Guide)/APPENDIX B
Statutory and Case Law for Common Pretrial Motions

APPENDIX B
Statutory and Case Law for Common Pretrial Motions

This appendix includes legal authority for motions that are not specifically discussed in this Action Guide and does not include judge's perspective.

1. ARRAIGNMENT MOTIONS (see [step 13](#) for discussion and judge's perspective).

Bail/O.R. Release [Pen C §1284](#); [Van Atta v Scott](#) (1980) 27 C3d 424, 166 CR 149.

Probable Cause Hearing [Pen C §991](#); [In re Walters](#) (1975) 15 C3d 738, 126 CR 239; [Crim Law chap 6](#).

Demurrer to Complaint [Pen C §§1002, 1004](#); [Crim Law chap 7](#); [step 13](#).

2. DISCOVERY MOTIONS (see [steps 27-29](#) and [step 36](#) for discussion and judge's perspective on some of these motions).

General Motion See [steps 27-29](#) and [Crim Law, chap 11](#).

Discriminatory Enforcement [Murgia v Municipal Court](#) (1975) 15 C3d 286, 124 CR 204. See [step 36](#) and [Crim Law, chap 18](#).

Informant's Identification [Eleazer v Superior Court](#) (1970) 1 C3d 847, 83 CR 586; [Honore v Superior Court](#) (1969) 70 C2d 162, 168, 74 CR 233 (burden of proof); [Crim Law, chap 17](#). See [step 36](#).

Past Police Misconduct [Evid C §§1043-1047](#); [Pitchess v Superior Court](#) (1974) 11 C3d 531, 113 CR 897; [City of Santa Cruz v Municipal Court](#) (1989) 49 C3d 74, 260 CR 520 (good cause for discovery); [Crim Law, chap 11](#). See [step 27](#).

3. MOTIONS TO DISMISS

Lost Evidence [California v Trombetta](#) (1984) 467 US 479, 81 L Ed 2d 413, 104 S Ct 2528.

Right to Counsel (Interfere) [Barber v Municipal Court](#) (1979) 24 C3d 742, 157 CR 658; see [People v Contrell](#) (1992) 7 CA4th 523, 550, 9 CR2d 188 (invasion of privileged defense materials discussed).

Speedy Trial [Pen C §§1381, 1381.5](#); [Serna v Superior Court](#) (1985) 40 C3d 239, 219 CR 420; see [Crim Law, chap 19](#).

[Pen C §4011.6](#) (delay of trial when detrimental to mentally disordered client's well being) [People v Vass](#) (1987) 196 CA3d Supp 13, 242 CR 330.

Vindictive Prosecution [Twigg v Superior Court](#) (1983) 34 C3d 360, 371, 194 CR 152; [Crim Law, chap 18](#). See [step 36](#).

4. OTHER PRETRIAL MOTIONS

Challenge to Trial Judge (see [step 38](#))

Peremptory Challenge [CCP §170.6](#); see [Crim Law, chap 21, step 38](#).

Challenge for Cause [CCP §170.1](#); see [Crim Law, chap 21, Step 38](#).

Change of Venue [Muller v Justice Court](#) (1954) 129 CA2d 570, 277 P2d 866; [Crim Law, chap 15](#).

Continuance [Pen C §1050](#); [Crim Law, chap 20](#).

Lineup [Evans v Superior Court](#) (1974) 11 C3d 617, 114 CR 121; see [Crim Law, chap 22](#).

Conditional Examination of Witness [Pen C §§1335-1345](#); see [Crim Law, chap 11](#).

Prior Convictions See [Crim Law, chap 24](#).

Bifurcation [People v Saunders](#) (1993) 5 C4th 580, 20 CR2d 638.

Stipulate [People v Valentine](#) (1986) 42 C3d 170, 228 CR 25.

Strike [People v Sumstine](#) (1984) 36 C3d 909, 206 CR 707.

Quashing Subpoena [People v Rhone](#) (1968) 267 CA2d 652, 73 CR 463; see [Crim Law, chap 4](#).

Recusal of Prosecutor [Pen C §1424](#); [Hambarian v Superior Court](#) (2002) 27 C4th 826, 118 CR2d 725; [People v Snow](#) (2003) 30 C4th 43, 132 CR2d 271; [Crim Law, chap 18](#).

Sever Charges

Pen C §954; *Coleman v Superior Court* (1981) 116 CA3d 129, 172 CR 86; see *Crim Law*, chap 7.

Sever Defendant

Pen C §1098; see *Pen C §954.1; Williams v Superior Court* (1984) 36 C3d 441, 204 CR 700; see *Crim Law*, chap 7.

Suppression of Evidence for Illegal Search and Seizure
Transcript of Prior Trial

Pen C §1538.5; *Crim Law*, chap 16.
People v Hosner (1975) 15 C3d 60, 123 CR 381.

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Source: Criminal Law/Defending Your Client in a Misdemeanor Case (Including a DUI) (Action Guide)/APPENDIX C
Research Resources

APPENDIX C
Research Resources

IMMIGRATION PROBLEMS

Brady, Katherine A., *California Criminal Law and Immigration* (Immigrant Legal Resource Center, 2004)

Kesselbrenner & Rosenberg, *Immigration Law and Crimes* (West Group 2003)

See other resources listed in [Crim Law §52.1](#).

PRETRIAL MOTIONS

These resources are excellent starting points to research the range of pretrial motions.

Bell, James Scott, *Bell's Search & Seizure Compendium, Courtroom Compendiums* (Woodland Hills, CA, Courtroom Compendiums)

[California Criminal Law Forms Manual \(2d ed Cal CEB 2005\)](#)

[California Criminal Law Procedure and Practice \(Cal CEB Annual\)](#)

California Points & Authorities (New York, Matthew Bender 1985) (looseleaf; updated)

Millman, Michael, et al., *California Criminal Defense Practice* (New York, Matthew Bender 1981) (looseleaf; updated)

LaFave, Wayne R., *Search and Seizure: A Treatise on the Fourth Amendment* (3d ed West Pub. 1996)

Rucker & Overland, *California Criminal Forms and Instructions* (2d ed Bancroft-Whitney 1993)

TRIAL PREPARATION

[Effective Introduction of Evidence in California \(2d ed Cal CEB 2000\)](#)

Bennett, Dimitrius and Hirschhorn, *California Guide to Jury Selection & Trial Dynamics: California Criminal Litigation* (West Pub. Co. 1994)

Bergman, *Trial Advocacy in a Nutshell* (3d ed West Pub. Co. 1997)

[California Trial Objections \(Cal CEB Annual\)](#)

[California Criminal Law Procedure and Practice \(Cal CEB Annual\)](#)

California Judges Benchbook: Criminal Proceedings (Cal CEB 1991)

Cotchett, *California Courtroom Evidence* (5th ed Michie Co. 2000)

Fiandach, *Handling Drunk Driving Cases* (2d ed Clark Boardman Callaghan 1995)

Hegland's *Trial and Practice Skills in a Nutshell* (3d ed West Pub. Co. 2001)

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Source: Criminal Law/Defending Your Client in a Misdemeanor Case (Including a DUI) (Action Guide)/APPENDIX D
Timeline and Deadlines in Misdemeanor Case

APPENDIX D

Timeline and Deadlines in Misdemeanor Case

ACTION	DEADLINE AND AUTHORITY	SEE*	CLIENT'S DATE
Arrest			_____
<i>McLaughlin</i> Probable Cause Hearing	48 hours after arrest (<i>County of Riverside v McLaughlin</i> (1991) 500 US 44, 114 L Ed 2d 49, 111 S Ct 1661).	<u>Step 13</u>	_____
Arraignment	<i>If in jail:</i> Without undue delay (<u>Pen C §825</u>): Maximum of 48 hours after arrest; or the next court day following. <i>If arraigned after release on citation:</i> At least 10 days after arrest; and Not more than 25 days after arrest (<u>Pen C §853.6</u>). <i>If arraigned on complaint:</i> Without undue delay (<u>Pen C §825</u>).	<u>Step 13</u>	_____
Demur	Before plea (<u>Pen C §1004</u>).	<u>Step 13</u>	_____
Probable Cause Hearing	After plea (<u>Pen C §991</u>).	<u>Step 13</u>	_____
Discovery	30 days before trial (<u>Pen C §1054.7</u>); OR 15 days after request (<u>Pen C §1054.5(b)</u>).	<u>Step 27</u>	_____
Pretrial Motions	Check local rules and statute for specific motion.	<u>Step 36</u>	_____
Make Peremptory Challenge to Judge	See <u>CCP §170.6</u> : 10 days after judge assigned for all purposes; 5 days before trial; At time of assignment; or	<u>Step 38</u>	_____
Trial	30 days after client appears. <i>If time for trial NOT waived by client</i> (see <u>Pen C §1382(a)(3)</u>): If in custody: 30 calendar days after arraignment or plea, whichever is later. If not in custody: 45 calendar days after arraignment or plea, whichever is later. <i>If time for trial waived by client</i> (see <u>Pen C §1382(a)(3)</u>): If client enters general waiver of 30-day or 45-day trial requirement, on proper notice of withdrawal of waiver, within 30 days of withdrawal (<u>Pen C §1382(a)(3)(A)</u>).	<u>Step 14</u>	_____

Sentencing/Judgment	<p>If client requests or consents to setting trial date beyond 30-day or 45-day requirement, within 10 calendar days of date set. (<u>Pen C §1382(a)(3)(B)</u>).</p> <p>Unless client waives time for sentencing (see <u>Pen C §1449</u>):</p>	<u>Step 53</u>	_____
	<p>Not earlier than 6 hours after the verdict.</p>		
Motion for New Trial	<p>Not later than 5 days after the verdict. Before sentencing (<u>Pen C §1182</u>).</p>	<u>Step 55</u>	_____
Motion in Arrest of Judgment	<p>Before sentencing (<u>Pen C §1185</u>).</p>	<u>Step 55</u>	_____

*Cross-references are to applicable steps in the Action Guide.

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Source: Criminal Law/Defending Your Client in a Misdemeanor Case (Including a DUI) (Action Guide)/APPENDIX E
Timeline and Deadlines in DUI Case

APPENDIX E

Timeline and Deadlines in DUI Case

ACTION	DEADLINE AND AUTHORITY	SEE*	CLIENT'S DATE
Arresting Officer Gives Notice of Suspension or Revocation. Officer Seizes License.	At time of arrest. See <u>Veh C §§13353.2, 13382</u> and <u>23612(f)</u> .	<u>Step 16</u>	_____
Issues Temporary License	At time of arrest. Valid for 30 days from issuance of notice of revocation or suspension. <u>Veh C §23612(f)</u> .	<u>Step 16</u>	_____
Demand Hearing	10 days after arrest, <i>i.e.</i> , after officer issues notice of revocation or suspension (<u>Veh C §13558(b)</u>).	<u>Step 16</u>	_____
DMV Automatically Reviews	Within 30 days after arrest, <i>i.e.</i> , after officer issues temporary license and before suspension or revocation becomes effective (<u>Veh C §13557(c)</u>).	<u>Step 16</u>	_____
DMV Holds Hearing	Within 30 days after arrest, <i>i.e.</i> , after officer issues temporary license and gives notice of revocation or suspension (<u>Veh C §13558(d)</u>).	<u>Step 16</u>	_____
License Suspended	30 days after arrest, <i>i.e.</i> , after officer issues temporary license and gives notice of revocation or suspension (<u>Veh C §13353.3(a)</u>).	<u>Step 16</u>	_____
Demand Court Review of DMV Hearing Deadlines in Criminal Case	30 days after decision in DMV hearing (<u>Veh C §13559(a)</u>).	<u>Step 16</u>	_____
		<u>Appendix D.</u>	

*Cross-references are to applicable steps in the Action Guide.

Source: Criminal Law/Defending Your Client in a Misdemeanor Case (Including a DUI) (Action Guide)/APPENDIX F
Explanation of Terms

APPENDIX F
Explanation of Terms

This appendix defines terms used in the Action Guide and references the steps in which the terms are discussed. It does not include Judge's Perspective.

ARRAIGNMENT

Usually, criminal defendant's first court appearance, at which judge instructs on basic rights, recognizes appearance of attorney, accepts entry of plea, considers bail, and hears challenges to probable cause for the charge or to the charging document. See [steps 12-16](#). See generally [Pen C §§976-992](#).

ARREST

Usually, when a police officer takes a person into custody.

BAIL

Bond or cash put up to ensure defendant's appearance in court. See [Pen C §§1268-1276.5](#). See [step 9](#).

CHALLENGE TO JUDGE OR JUROR

Means of removing judge or juror from case, either for cause or by peremptory challenge. See [step 38](#) (for judge) and [step 44](#) (for jurors).

CITATION

Written notice to appear in court at a specific date and time; many misdemeanants are issued a citation. [Pen C §§53.6](#). See [step 7](#).

CIVIL COMPROMISE

Resolution of the case by reimbursement to the victim of his or her loss. See [Pen C §§1377-1379](#). See [step 35](#).

CONCURRENT SENTENCE

Sentence served simultaneously with another sentence. Sentences are presumed to be concurrent unless specifically stated otherwise. [Pen C §669](#). See [step 62](#).

CONDUCT CREDIT

Deduction from sentence for time defendant spent in custody, and satisfactorily performed assigned labor and complied with rules and regulations. [Pen C §4019](#). See [step 70](#).

CONSECUTIVE SENTENCE

Sentence served immediately after another sentence. See [steps 62](#) and [68](#).

CROSS-EXAMINATION

Examination of witness by opposing counsel after direct examination. See [step 47](#).

CUSTODY CREDITS

Credit against any sentence for time defendant has spent in custody related to the charge. [Pen C §2900.5\(a\)](#). See [step 70](#).

DEFERRED ENTRY OF JUDGMENT

Method of obtaining dismissal of pending charges in minor drug offenses, and other offenses specified by statute. Requires guilty plea and time waiver. Generally requires participation in some form of counseling. See [steps 32](#) and [34](#).

DEMURRER

Procedure for challenging charging document before entry of plea. See [Pen C §1004](#); [step 13](#); and [Appendixes A-B](#) to this Action Guide.

DISCOVERY

Information prosecution supplies to the defense and that defense must provide to prosecution. See [steps 15, 26-29](#).

DISMISSALS

Dismissals of charges may be granted in interest of justice, for violation of speedy trial rights, and for completion of diversionary programs.

DIVERSION

Method of obtaining dismissal of pending criminal charges before entry of plea. Available in most non-drug-related misdemeanors. Usually requires some form of counseling or community service. See [steps 32](#) and [34](#).

DMV HEARING

Department of Motor Vehicle administrative hearing, independent of criminal prosecution, that might result in suspension or revocation of driving privileges. See [step 16](#) and [Appendix E](#) to this Action Guide.

DUI

Driving under the influence of alcohol or controlled substance. See [Veh C §§23152-23153](#). See [step 16](#), [step 61](#), and [Appendix E](#).

EVIDENTIARY OBJECTIONS

Objections to evidence offered by the other side. See [step 46](#).

FINAL ARGUMENT

At conclusion of evidence in jury trial, prosecutor usually argues case to jury, followed by defense argument and concluding prosecution argument. See [steps 50-51](#).

IMMIGRATION CONSEQUENCES

Criminal conviction may result in a criminal defendant's deportation, exclusion, or denial of naturalization; factors include number of convictions, involvement of weapons, sentence length, moral nature of violation. See [step 17](#).

INVESTIGATION

The process of gathering evidence. See [steps 20-23](#).

JAIL ALTERNATIVES

Include opportunity to work and return to jail after work, community service, treatment facility residence, home confinement. See [step 60](#).

JURY SELECTION

Process of selecting the jurors for a jury trial. See [steps 43-44](#).

MAXIMUM SENTENCE

For misdemeanors, 1 year in jail. See [step 3](#).

MENTAL HEALTH ISSUES

Defendant must be competent to stand trial; various procedures exist to identify and serve mental health needs of criminal defendants. See, *e.g.*, [Pen C §§4011.6, 4011.8, 1367-1368](#); [step 18](#).

MOTION FOR NEW TRIAL

Following guilty verdict and prior to pronouncement of sentence, defense may seek new trial. [Pen C §1180](#). See [step 55](#).

MULTIPLE PUNISHMENT, PROHIBITION AGAINST

Under [Pen C §654](#), when an act violates more than one penal statute, the defendant can be charged with and convicted of more than one offense, but can only be punished once as long as he or she had only a single criminal intent. See [step 67](#).

OPENING STATEMENT

Follows jury selection and precedes introduction of evidence. See [step 45](#).

O.R.

Own recognizance. O.R. release is generally available to misdemeanor defendants and saves expense of bail. See [steps 7-8](#).

PEN C §1381 DEMAND

Demand by prisoner sentenced to more than 90 days in jail to be brought to trial on unresolved criminal charges. [Pen C §1381](#). See [step 73](#).

PEN C §1385 DISMISSAL

Judge's dismissal of criminal charge "in the interests of justice." [Pen C §1385](#). See [step 39](#).

PLEA BARGAINING

Resolution of criminal case without trial by negotiation between prosecution, defendant, and sometimes court. See [steps 32-35](#).

PRESENTENCE REPORT

After conviction, judge may order probation department to prepare report intended to aid judge in determining appropriate sentence. See [step 57](#).

PRETRIAL CONFERENCE

Generally conducted with judge, prosecutor, and defense attorney to determine whether case can be resolved through plea bargain. See [step 31](#).

PRETRIAL MOTIONS

Include suppression of evidence, speedy trial, or discovery concerns. See [steps 36-37](#) and [Appendixes A-B](#) to this Action Guide.

PROBABLE CAUSE HEARING

Within 48 hours of arrest, defendant in custody is entitled to determination of probable cause to believe that he or she committed the offense. [Pen C §991](#). Defendant can also raise issue at arraignment. See [step 13](#).

PROBATION

Release of defendant under conditions set by court. If no probation officer assigned, also called conditional sentence. See [step 33](#).

PROFESSIONAL LICENSE CONSIDERATIONS

Conviction of an offense and referral to diversion for some purposes can result in exclusion from licensing or employment in certain professions. See [step 19](#).

PROPOSITION 36

An initiative measure passed in 2000 that enacted a separate, mandatory probation scheme for defendants convicted of nonviolent drug offenses. See [Pen C §1210.1](#); [step 33](#).

RESTITUTION

Compensation to the victim for losses caused by crime. Must be ordered in all cases in which victim has suffered loss, absent

extraordinary circumstances. See [steps 59](#) and [69](#).

RESTITUTION FINE

Fine payable to state restitution fund. Must be imposed in all cases (even when no victim is entitled to restitution) absent extraordinary circumstances. See [step 59](#).

SENTENCING

Statute, rules of court, and case law determine sentencing options and requirements. See [steps 66-74](#).

SENTENCING HEARING

Post-conviction hearing on appropriate sentence to be imposed. See [steps 63-70](#).

SEX OFFENSE REGISTRATION

Conviction of certain sex offenses may require defendant to register current address with law enforcement. [Pen C §290](#). See [step 72](#).

SPEEDY TRIAL

Defendant has constitutional right to speedy trial (for misdemeanors, usually within 1 year) and statutory right to speedy trial (unless defendant waives this right, generally trial within 30 days if defendant in jail, and 45 days if not). See [Pen C §1382\(a\)\(3\)](#). See [step 14](#).

SUBPOENAS

Compulsory process for obtaining witnesses or other evidence. See [step 25](#).

TIME FOR SENTENCE

Defendant is entitled to be sentenced in not less than 6 hours and not more than 5 days following a finding of guilt, unless defendant desires more or less time. See [Pen C §1449](#). See [step 53](#).

TIMELINE OF DUI CASES

Time limits that apply to suspension or revocation of driving privileges. See [Appendix E](#) to this Action Guide.

TIMELINE OF MISDEMEANORS

Unless defendant waives time, generally trial within 30 days if defendant is in jail, and 45 days if not. [Pen C §1382](#). See [Appendix D](#) to this Action Guide.

VEHICLE CODE DISMISSALS

If defendant has certain vehicle code offenses pending at the time of commitment to state prison, these may be dismissed. [Veh C §41500](#). See [step 74](#).

VERDICT

Jury's decision. See [step 52](#).

VOIR DIRE

Questioning of jurors at beginning of jury trial. See [step 43](#).

WAIVER OF TIME

Defendant's waiver of time for trial, usually 30 days if defendant in custody, 45 days if not. See [step 14](#).

Source: Criminal Law/Defending Your Client in a Misdemeanor Case (Including a DUI) (Action Guide)/APPENDIX G
Sample Informal Request for Discovery

APPENDIX G

Sample Informal Request for Discovery

OFFICE OF THE PUBLIC DEFENDER

City and County of San Francisco

(415) 553-1671

Defendant's name:	Court No.:
Date served:	Trial Deputy:

INFORMAL REQUEST FOR DISCOVERY

TO THE DISTRICT ATTORNEY OF THE CITY AND COUNTY OF SAN FRANCISCO:

Notice is hereby given, pursuant to San Francisco Uniform Court Rule 16.8 and Penal Code §§1054 and 1054.5(b), that the above-named defendant is requesting disclosure and production of the following materials and information within 15 days of the date of service of this request:

- (1) All statements or utterances by a defendant, oral or written, however recorded or preserved, whether or not signed or acknowledged by the defendant.
- (2) The names and addresses of all witnesses who may be called to testify against the defendant at the trial.
- (3) All written or recorded statements of said testifying witnesses or reports of such statements relating and all rough notes of such statements (Roland v Superior Court (2004) 124 CA4th 154, 21 CR3d 151; Thompson v Superior Court (1997) 53 CA4th 480, 61 CR2d 785).
- (4) Examination of all physical evidence obtained in the investigation of the case against the defendant.
- (5) All laboratory, technician and other reports concerning the testing and examination of said physical evidence.
- (6) All reports of experts made in conjunction with the case, involving the results of physical or mental examinations, scientific tests, experimental or comparisons which the prosecutor intends to offer in evidence at the trial.
- (7) All photographs, motion pictures or video tapes taken of the defendant at or near the time of his [her] arrest in this case.
- (8) Examination of all photographs, video tapes, motion pictures, composites or likenesses shown to witnesses and prospective witnesses in this case for the purpose of establishing the identity of suspects in the crime charged against the defendant, and all reports concerning the display of such.
- (9) All records of any morally turpitudinous conduct of any witnesses to be called to testify against the defendant.
- (10) All notes or reports of police officers and investigators concerning the offense charged.
- (11) Examination of all photographs, transparencies, slides, diagrams, motion pictures and video tapes of the scene of the alleged offense.
- (12) Any record of criminal arrests or convictions of the defendant.
- (13) Any exculpatory evidence in the possession of any police department, the District Attorney, or any other person or agency and available to the prosecution.

San Francisco Uniform Court Rule 16.8(A)(1); Pen C §1054.

In addition, the defendant requests the following information and materials favorable to the accused and material either to guilt or to punishment (Brady v Maryland (1963) 373 US 83, 10 L Ed 2d 215, 83 S Ct 1194), or mandated by the United States Constitution (Pen C §1054(e)):

(1) Any record of criminal arrests or convictions, whether for felonies or misdemeanors, of any witness to be called to testify against the defendant (Cal Const art I, §28(d); People v Wheeler (1992) 4 C4th 284, 14 CR2d 418; People v Lang (1989) 49 C3d 991, 264 CR 386; People v Harris (1989) 47 C3d 1047, 255 CR 352).

(2) Any evidence, information, documents and other materials favorable to the defendant in the possession of the District Attorney, or of any police department involved in the investigation of the case against defendant, or of any agency or person and available to the prosecution through the exercise of due diligence (Kyles v Whitley (1995) 514 US 419, 131 L Ed 2d 490, 115 S Ct 1555; In re Brown (1998) 17 C4th 873, 72 CR2d 698).

(3) Any information relevant to impeachment of any witness that the prosecution intends to call at the trial (Davis v Alaska (1974) 415 US 308, 39 L Ed 2d 347, 94 S Ct 1105; U.S. v Bagley (1985) 473 US 667, 87 L Ed 2d 481, 105 S Ct 3375).

(4) The identity and whereabouts of any material informants (Renzi v Virginia (4th Cir 1986) 794 F2d 155).

(5) Any evidence to be used in rebuttal of the defense case (People v Bunyard (1988) 45 C3d 1189, 249 CR 71).

(6) Tape recordings and Computer Activated Dispatch (CAD) printouts of any and all telephone calls or broadcasts pertaining to the above case.

Defendant asks that this document be treated as a continuing request through the completion of trial.

This document was served on an assistant district attorney for the City and County of San Francisco on the below date.

DATED: _____

I acknowledge receipt of a copy of this Informal Discovery Request.

DATED: _____

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Source: Criminal Law/Defending Your Client in a Misdemeanor Case (Including a DUI) (Action Guide)/TABLE OF STATUTES, REGULATIONS, AND RULES

TABLE OF STATUTES, REGULATIONS, AND RULES

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